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Accommodating Growth and Development After *Guilderland*: Is the New York Legislature About to (Re)Act on Impact Fees?

Michael G. Sterthous

This Comment analyzes a problem facing many local governments in New York State - trying to accommodate growth and development with adequate public infrastructure in a time when federal and state funds have been reduced and the general public is vehemently opposed to increased taxes. While not permitted to stop growth, some municipalities have attempted to make new development pay its fair share of the costs for additional infrastructure. Such actions have received a negative response by the New York State Court of Appeals which has held that local governments lack proper authority to condition development approval on exaction of fees for off-site improvements. The author concludes that legislative action at the state level is needed in this area and offers some suggestions.

I. Introduction

*"Zoning . . . is essentially a legislative act."*¹

The New York State Legislature has maintained a policy of complacency in guiding local municipal zoning authority over the past several years.² As a result, it has been the local

1. *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 111, 341 N.E.2d 236, 243, 378 N.Y.S.2d 672, 682 (1975).

2. This conclusion is based on review of the state zoning enabling legislation, codified at N.Y. TOWN LAW art. 16, §§ 261-284 (McKinney 1987 & Supp. 1991), which demonstrates inactivity on the part of the state legislature. Section 261 of the Town Law is the general state zoning authority enabling provision. This statute became

governing bodies, tempered by an active state judiciary, that have formulated the metes and bounds of New York's emerging zoning practices.³ In the area of growth management, this combination of legislative indifference and judicial constraint of municipal authority has created a difficult fiscal situation for local governments.⁴

In response to efforts by suburban municipalities to control surging development pressures, the state judiciary has mandated that local governments are prohibited from excluding development.⁵ At the same time, the judiciary has maintained that local governments have an obligation to accommodate development with adequate services and infrastructure.⁶ Due to decreases in federal and state funding, local governments have been left holding the infrastructure bill.⁷ However, current local financing mechanisms, in place to pay for the needs of new development, are proving inadequate.⁸

In light of this situation, municipalities have sought to shift some of these costs to the very source of the need for increased infrastructure, the new development. This has taken

effective in 1932. Since then, it has only been amended twice, once in 1956, and again in 1989 with the addition of Section 261-a, establishing transfer of development rights. Section 274-a, which grants local authority for site plan approval, became effective in 1976 without significant amendment since then. Section 276, which creates local authority for subdivision approval, became effective in 1973 and also has not been significantly amended since. *See also* 1 R. ANDERSON, *NEW YORK ZONING LAW & PRACTICE* § 2.02 (3d ed. 1984).

3. *See* *McMinn v. Town of Oyster Bay*, 111 Misc. 2d 1046, 1057, 445 N.Y.S.2d 859, 867 (Sup. Ct. 1981)("[P]olice power resides within the state and is delegated by it, insofar as zoning is concerned, to the town."), *aff'd as modified on other grounds*, 105 A.D.2d 46, 482 N.Y.S.2d 773 (1984), *aff'd*, 66 N.Y.2d 544, 488 N.E.2d 1240, 498 N.Y.S.2d 128 (1985). *See also* R. ANDERSON, *AMERICAN LAW OF ZONING* § 2.02 (3d ed. 1986)("[M]ost states have chosen not to use the zoning power but to delegate it.").

4. *See infra* notes 69-98 and accompanying text.

5. *See infra* notes 33-56 and accompanying text.

6. *See infra* notes 57-68 and accompanying text. "[I]nfrastructure represents a set of services, such as reliable transport of goods and people, fresh water, protection from floods, and safe disposal of wastes." Rutledge, *Public Infrastructure as a National Concern*, 11 A.B.A. SEC. URB., ST. & LOC. L. NEWSL. 1, 16 (1987)(discussing the conclusions of the National Council on Public Works Improvement).

7. *See* Morgan, Duncan & McClendon, *Drafting Impact Fee Ordinances: Legal Foundations for Exactions*, 9 ZONING & PLAN. L. REP. 49 (1986).

8. *Id.* *See also infra* notes 69-98 and accompanying text.

many forms, including dedications and in-lieu fees,⁹ exactions,¹⁰ special improvement districts,¹¹ and impact fees.¹² These efforts have been the source of much adjudication, which has led to confusion regarding the authority local governments retain to regulate this area.

The impact fee,¹³ while the most innovative source of local revenue for accommodating growth and development, has met the most controversy. Nationwide, municipalities in over thirty-nine states impose impact fees of one sort or another on new development.¹⁴ In many states, local authority to enact impact fee ordinances is implied through the generally delegated local police powers, or similarly through the general zoning powers.¹⁵ In others, such implied authority is insufficient, and authority to exact impact fees must necessarily be found in specific state enabling legislation.¹⁶ The New York

9. See *infra* notes 107-132 and accompanying text.

10. See *infra* notes 126-127 and accompanying text.

11. See *infra* notes 133-164 and accompanying text.

12. See *infra* notes 173-238 and accompanying text.

13. Impact fees are defined as single payments required of developers as a condition of approval, to be used by localities to pay the development's proportionate share of the cost of off-site public facilities or services necessitated by new development. DELAWARE VALLEY REGIONAL PLANNING COMM'N, REGIONWIDE ASSESSMENT OF NON-TRANSPORTATION IMPACT FEES 6 (Sept. 1989)(available from the Delaware Valley Regional Planning Commission, 21 South Fifth Street, Philadelphia, Pa. 19106) [hereinafter REGIONWIDE ASSESSMENT].

14. *Issues in Focus: Impact Fees in New York — Back to the Drawing Board*, Senate Res. Serv. (N.Y. St. Senate) No. 36, at 2 (Jan. 16, 1990).

15. See *Wood Bros. Homes v. City of Colorado Springs*, 193 Colo. 543, 568 P.2d 487 (1977)(the court held that the Colorado constitution authorized home rule cities to pass ordinances to alleviate local problems such as drainage by charging development fees); *Contractors & Builders Ass'n v. City of Dunedin*, 329 So. 2d 314 (Fla. 1976)(landmark decision setting forth judicial prescription for constitutional fee ordinances in Florida); *Land/Vest Properties, Inc. v. Town of Plainfield*, 117 N.H. 817, 379 A.2d 200 (1977)(under enabling authority to regulate subdivisions, town could legitimately condition subdivision approval on the provision of improvements to off-site access roads); *Amherst Builders v. City of Amherst*, 61 Ohio St. 2d 345, 402 N.E.2d 1181 (1980)(authority to impose connection fees implied from broad interpretation of state constitution); *Call v. City of West Jordan*, 606 P.2d 217 (Utah 1979)(authority to require dedication of land or in-lieu fee for flood control and recreation facilities implied from the general welfare clause of state statute); *Coulter v. City of Rawlins*, 662 P.2d 888 (Wyo. 1983)(authority to impose impact fees for water and sewer connections implied from state enabling statutes).

16. See *City of Montgomery v. Crossroads Land Co.*, 355 So. 2d 363 (Ala.

Judiciary has adopted the latter school of thought.

In November 1989, the New York State Court of Appeals effectively dispelled all local authority to use impact fees as a means of funding roadway expansion and improvements, when it upheld the appellate division decision in *Albany Area Builders Association, Inc. v. Town of Guilderland*.¹⁷ While paying lip service to local authority to legislate under the Municipal Home Rule,¹⁸ the court held that the area of roadway improvement financing was preempted by the financing provisions of the New York State Highway Law and Town Law.¹⁹ It is likely that such a preemption ruling will defeat attempts to use the impact fee in other areas of growth accommodation as well.²⁰ With such a formidable hurdle, discussion of whether impact fee ordinances effect a regulatory taking, levy an unconstitutional tax, or violate due process or equal protection rights, becomes less relevant.²¹

After *Guilderland*, the only hope municipalities have for shifting some of the financial burden to accommodate growth lies with the state legislature. New state legislation, or amendment to the present zoning enabling act, will eliminate the costly and confusing litigation resulting from the trial-and-error local legislative practices in this area. If properly drafted, such legislation will alleviate the present lack of local lawmak-

1978)(court held that "without specific legislative authorization, the City had no power to require the payment of a fee in lieu of dedication of land for public parks"); *Eastern Diversified Properties, Inc. v. Montgomery County*, 319 Md. 45, 570 A.2d 850 (1990)(impact fee imposed as a condition on building permit approval was a tax which the county lacked authority to impose); *Holmdel Builders Ass'n v. Township of Holmdel*, 121 N.J. 550, 583 A.2d 277 (1990)(mandatory development fees constituted a proper municipal exercise of police power, provided specific statutory authority was delegated by state).

17. 74 N.Y.2d 372, 546 N.E.2d 920, 547 N.Y.S.2d 627 (1989), *aff'g*, 141 A.D.2d 293, 534 N.Y.S.2d 791 (1988).

18. *Id.* at 376, 546 N.E.2d at 921-22, 547 N.Y.S.2d at 628.

19. *Guilderland*, 74 N.Y.2d at 377-78, 546 N.E.2d at 922, 547 N.Y.S.2d at 629.

20. See *Coconato v. Town of Esopus*, 152 A.D.2d 39, 547 N.Y.S.2d 953 (1989)(local authority to finance capital improvements in a water district is preempted by the state legislature after the *Guilderland* decision).

21. See Steinman, *Impact Fees*, N.Y.L.J., Feb. 5, 1990, at 1, col. 1. See also Keenan, *A Perspective: New York Communities and Impact Fees*, 7 PACE ENVTL. L. REV. 329 (1990); Comment, *Impact Fee Exactions in New York: The Taxman Always Rings Twice*, 52 ALB. L. REV. 287 (1987)(authored by David D. DiBari).

ing authority in this area, and will guide the creation of local ordinances that treat municipalities, developers, and residents in the most equitable manner possible.

Section II of this Comment contains general background information pertaining to development trends and the practices of growth management. New York's judicial mandate against excluding growth is set forth in Section III, followed by an analysis of the municipal obligation to accommodate growth with adequate infrastructure in Section IV. Section V demonstrates the financial burden that growth accommodation has placed on local governments, while Section VI outlines local authority to meet these burdens in New York State through various growth management mechanisms. Section VII concludes with recommendations and suggestions for state legislative action to guide municipalities in their efforts to accommodate growth and development.

II. Perspective

*"Local growth management is defined as a conscious government program intended to influence the rate, amount, type, location and/or quality of future development and the provision of services within a local jurisdiction."*²²

The first half of the twentieth century witnessed a steady migration of population to urban areas which fueled metropolitan growth.²³ However, due to a combination of factors, including overpopulation and overcrowding, a prohibitive high cost of living, increased mobility due to improved transportation facilities, and a desire for open space, this migration has reversed in the latter half of the century.²⁴ By the end of the 1970's, more people lived in the suburban fringes of metropolitan areas than in the central cities for the first time in his-

22. D. GODSCHALK, D. BROWER, L. MCBENNETT, B. VESTAL & D. HERR, CONSTITUTIONAL ISSUES OF GROWTH MANAGEMENT 8 (1979) [hereinafter GODSCHALK].

23. *Id.* at 6.

24. *Id.* See also Juergensmeyer & Blake, *Impact Fees: An Answer to Local Governments' Capital Funding Dilemma*, 14 LAND USE & ENV'T L. REV. 247 (1983).

tory.²⁵ This exodus has continued through the 1980's. The ring of developing suburbia has expanded, with new development leapfrogging into counties and villages that have, up to this point, been practically undeveloped.²⁶

Faced with the pressure for new development, local municipalities have turned to their delegated zoning powers to organize this growth. However, growth management has become much more than siting new homes and similar types of physical construction.²⁷ Growth carries extra-developmental ramifications, creating burdens on existing infrastructure and increasing the demand for more capital services and facilities.²⁸ Local growth management can thus be defined as a "conscious government program intended to influence the rate, amount, type, location and/or quality of future development and the provision of services within a local jurisdiction."²⁹ The extent of local government regulatory authority in this area has become one of constant debate in academia,³⁰

25. GODSCHALK, *supra* note 22, at 6; Juergensmeyer & Blake, *supra* note 24, at 247 (citing U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1979, at 17 (100th ed. 1979) ("Between 1970 and 1978 the white population of central cities in the United States decreased at an annual rate of 1.2 percent.")).

26. CORNELL COOPERATIVE EXTENSION OF DUTCHESS COUNTY & AMERICAN FARM-LAND TRUST, COST OF COMMUNITY SERVICES STUDY (1989) [hereinafter COST OF COMMUNITY SERVICES STUDY]. Between 1950 and 1980, the population of Dutchess County, New York, has increased 80%, from 136,781 to 245,055. *Id.* at 2. Current estimates predict a population of 326,000 by the year 2010. *Id.* Indicative of this trend, the number of housing units in the county has increased by 25.6% over the ten year period of 1970 to 1980. *Id.* See also *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 105, 341 N.E.2d 236, 238-39, 378 N.Y.S.2d 672, 676 (1975) (since 1950, the Town of New Castle has had a three-fold increase in population from 5,312 to 17,000).

27. Nicholas, *Impact Exactions: Economic Theory, Practice, and Incidence*, 50 LAW & CONTEMP. PROBS. 85, 87 (1987).

28. DEVELOPMENT EXACTIONS 8 (J. Frank & R. Rhodes eds. 1987) (capital facilities provided and maintained by local governments include: schools, roads, sewerage systems, stormwater drainage, water supply, transit facilities, airports, solid waste disposal, police and fire protection, recreational services, libraries, museums, civic centers, parking structures, and social services).

29. GODSCHALK, *supra* note 22, at 8.

30. See Keenan, *A Perspective: New York Communities and Impact Fees*, 7 PACE ENVTL. L. REV. 329 (1990); Comment, *Impact Fee Exactions in New York: The Taxman Always Rings Twice*, 52 ALB. L. REV. 287 (1987) (authored by David D. DiBari); Note, *Impact Fees in Pennsylvania: Requiring Land Developers to Bear Development-Related Costs*, 50 U. PITT. L. REV. 1101 (1989) (authored by Pamina Ew-

the legislature,³¹ and the courts.³² In New York State, the judiciary has led the way in defining this authority.

ing). See also Nelson, *Land Exaction: A Selective Bibliography*, 50 LAW & CONTEMP. PROBS. 177 (1987).

31. Since 1989, thirteen states have enacted specific impact fee enabling legislation authorizing local governments to charge new development a proportionate share of the cost of accommodating it with new or improved infrastructure. See *infra* note 321.

32. See *Home Builders Ass'n v. City of Scottsdale*, 116 Ariz. 340, 569 P.2d 292 (Ct. App. 1977)(ordinance levying water development charge on developers for units for which building permits were obtained after effective date of ordinance was valid); *William S. Hart Union High School Dist. v. Regional Planning Comm'n.*, 226 Cal. App. 3d 1612, 277 Cal. Rptr. 645 (1991)(county was not prohibited from denying zoning change based on inadequacy of school facilities); *Bixel Assocs. v. City of Los Angeles*, 216 Cal. App. 3d 1208, 265 Cal. Rptr. 347 (1989)(city failed to show that method used to determine amount of fire hydrant fee bore a fair and reasonable relation to developer's benefit from fee as required to avoid invalidation as unauthorized tax); *City of Arvada v. City & County of Denver*, 663 P.2d 611 (Colo. 1983)(city had authority to impose development fee on new users of city water system without infringing upon equal protection rights); *City of Key West v. R.L.J.S. Corp.*, 537 So. 2d 641 (Fla. Dist. Ct. App. 1989)(assessment of developmental impact fees upon developers of condominium apartment building did not violate developers' constitutionally protected rights); *Downey v. Wells Sanitary Dist.*, 561 A.2d 174 (Me. 1989)(decision to impose a sewer impact fee on residential and commercial developments, for which occupancy permits were issued after particular date, did not deny equal protection); *Eastern Diversified Properties, Inc. v. Montgomery County*, 319 Md. 45, 570 A.2d 850 (1990)(impact fee imposed as a condition on building permit approval was a tax which the county lacked authority to impose); *Beauty Built Constr. Corp. v. City of Warren*, 375 Mich. 229, 134 N.W.2d 214 (1965)(city ordinance that required water development charge on future building permits rather than future connections did not deny equal protection); *Lechner v. City of Billings*, 797 P.2d 191 (Mont. 1990)(municipality had authority to establish fees collected from new users for purpose of funding portion of cost of future expansion of water and sewer systems); *Holmdel Builders Ass'n v. Township of Holmdel*, 121 N.J. 550, 583 A.2d 277 (1990)(mandatory development fees constituted a proper municipal exercise of police power, provided specific statutory authority was delegated by state); *Cranberry Township v. Builders Ass'n*, No. 90-386 (Pa. Commw. Ct. Feb. 6, 1991)(WESTLAW, States library, Pa. case file)(new state zoning amendment provides retroactive authority for local government that enacted an impact fee ordinance prior to June 1, 1990, to impose such fees); *Banberry Dev. Corp. v. South Jordan City*, 631 P.2d 899 (Utah 1981)(advance collection of water connection fee and park improvement fee from subdivider designed to raise funds to enlarge and improve sewer and water systems and recreational opportunities would be valid provided they were reasonable).

III. Non-Exclusion Mandate

*"We only require that communities confront the challenge of population growth with open doors."*³³

In facing the pressures of surging development, suburban municipalities have turned to their legislatively delegated powers to zone. The authority to zone, and therefore control the extent, pace, and character of land development, has traditionally been considered a matter of local governance.³⁴ In New York State, the power to zone has been granted to local municipalities by the state zoning enabling act, section 261 of the Town Law.³⁵

A majority of suburban and exurban communities in New York are residentially zoned for single-family dwellings.³⁶ As noted in Section II, population growth and other factors have created increased demands on these areas for other forms of low to moderate income housing.³⁷ Exurban areas tend to re-

33. *Golden v. Planning Bd.*, 30 N.Y.2d 359, 379, 285 N.E.2d 291, 302, 334 N.Y.S.2d 138, 153, *appeal dismissed*, 409 U.S. 1003 (1972).

34. R. ANDERSON, *supra* note 2, § 2.02. See also *Adler v. Deegan*, 251 N.Y. 467, 485, 167 N.E. 705, 711 (1929) (Cardozo, C.J., concurring) ("A zoning resolution in many features is distinctively a city affair, a concern of the locality. . . .").

35. N.Y. TOWN LAW § 261 (McKinney 1987). Section 261 states:

For the purpose of promoting the health, safety, morals, or the general welfare of the community, the town board is hereby empowered by ordinance to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied . . . and the location and use of buildings, structures and land for trade, industry, residence or other purposes; provided that such regulations shall apply to and affect only such part of the town as is outside of any incorporated village or city

Id. Accord N.Y. VILLAGE LAW § 7-700 (McKinney 1973).

36. R. ANDERSON, *supra* note 2, § 8.03. "Exurban" communities are generally defined as "those beyond the suburbs of a city, inhabited chiefly by the well-to-do." HOUGHTON MIFFLIN COLLEGE DICTIONARY 458 (1986).

37. See, e.g., GODSCHALK, *supra* note 22, at 7 (quoting H. PERLOFF, *AGENDA FOR THE NEW URBAN ERA* (1975)).

Much of the current demand for new residential development is due to the coming of age of the baby-boom generation that followed World War II. . . . "All in all, demographic factors point toward a strong future demand for smaller, multifamily housing units, close to public transportation, shopping and recreation. Policies directed toward fostering efficient, compact forms of

sist this type of development, and have used their local zoning powers to guide it elsewhere.³⁸

Cognizant of these trends and tendencies, the New York Court of Appeals has interpreted the legislatively delegated zoning power as a local responsibility to positively guide growth.³⁹ To this end, the court has mandated municipalities not to exclude or immunize themselves, but rather to accommodate future growth and development.⁴⁰

This judicial mandate was given life in the landmark de-

new development and toward preventing further urban sprawl reflect these implicit needs."

Id.

38. *See Berenson v. Town of New Castle*, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975)(discussed *infra* notes 52-56 and accompanying text). *See generally* R. ANDERSON, *supra* note 2, §§ 8.01-13.

"Exclusionary zoning" has been defined as land use control regulations that "serve[] to erect exclusionary walls on the municipality's boundary according to local selfishness for socially improper goals which are beyond the legitimate purpose of zoning." BLACK'S LAW DICTIONARY 1619 (6th ed. 1990). *See National Land & Inv. Co. v. Kohn*, 419 Pa. 504, 215 A.2d 597 (1965)(reasoning behind various exclusionary zoning regulations includes: to preserve property values, insure adequate light and air, to protect the appearance of the community, to preserve the existing character of neighborhoods, and to preserve the public health by providing adequate land to handle the sewage problem in the absence of public disposal systems; another reason low and moderate income housing is often excluded is that it places an increased pressure on public services while adding a much lower resource base to help pay for it).

39. *Golden v. Planning Bd.*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972).

40. *Id.* at 378, 285 N.E.2d at 302, 334 N.Y.S.2d at 152. For a similar perspective outside of New York, see *National Land & Inv. Co. v. Kohn*, 419 Pa. 504, 215 A.2d 597 (1965).

Zoning is a means by which a government body can plan for the future - it may not be used as a means to deny the future A zoning ordinance whose primary purpose is to prevent the entrance to newcomers in order to avoid future burdens, economic or otherwise, upon the administration of public services and facilities can not be held valid.

Id. at 528, 532, 215 A.2d at 610, 612. *See also* *Southern Burlington NAACP v. Township of Mount Laurel*, 92 N.J. 158, 208, 456 A.2d 390, 415 (1983)(municipalities' land use regulations that do not provide the requisite opportunity for a fair share of the region's need for low to moderate income housing conflict with the general welfare and violate the state constitutional requirements of substantive due process and equal protection). Conversely, courts in Florida have upheld the validity of exclusionary zoning provisions without qualification. *Blank v. Town of Lake Clarke Shores*, 161 So. 2d 683 (Fla. Dist. Ct. App. 1964); *Gautier v. Town of Jupiter Island*, 142 So. 2d 321 (Fla. Dist. Ct. App. 1962).

cision of *Golden v. Planning Board*.⁴¹ The Town of Ramapo designed an innovative zoning ordinance which intended to control growth through sequencing development with the provision of capital improvements.⁴² The town's goal was to permit residential development to grow in conjunction with an eighteen-year capital improvement schedule.⁴³ Subdivision permits were granted on the condition of acquiring a certain number of "development points."⁴⁴ Points were awarded for the presence of sufficient services such as sewers, drainage, park or recreation facilities, improved roads, and firehouses.⁴⁵ Permit approval was suspended until such time that these necessary services were put in place by the municipality,⁴⁶ in accord with its improvement schedule.⁴⁷ Theoretically, this system could postpone a project for up to the full eighteen years of the planned improvement schedule. To reduce such a postponement, a developer was authorized to speed up the permit process by voluntarily installing the improvements at his own cost, thereby, in effect, purchasing the required points.⁴⁸

In upholding the validity of the Ramapo ordinance, the court of appeals found that the restriction on development was only temporary and that the plan's ultimate purpose was to enhance the municipality's ability to accommodate future growth.⁴⁹ Therefore, it held that the Ramapo plan was not exclusionary, but was within the authority of the zoning enabling legislation.⁵⁰ The court qualified its holding by adding: "What we will not countenance . . . under any guise, is community efforts at immunization or exclusion."⁵¹

41. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972).

42. *Id.* at 369, 285 N.E.2d at 296, 334 N.Y.S.2d at 145.

43. *Id.* at 368, 285 N.E.2d at 296, 334 N.Y.S.2d at 144.

44. *Id.* at 369, 285 N.E.2d at 296, 334 N.Y.S.2d at 144.

45. *Id.* at 368, 285 N.E.2d at 295, 334 N.Y.S.2d at 143-44.

46. *See infra* notes 57-68.

47. *Golden*, 30 N.Y.2d at 368, 285 N.E.2d at 295, 334 N.Y.S.2d at 144.

48. *Id.* at 368-69, 285 N.E.2d at 296, 334 N.Y.S.2d at 144.

49. *Id.* at 369, 285 N.E.2d at 296, 334 N.Y.S.2d at 144-45.

50. *Id.* at 371, 285 N.E.2d at 297, 334 N.Y.S.2d at 146.

51. *Id.* at 378, 285 N.E.2d at 302, 334 N.Y.S.2d at 152.

Reemphasizing its *Golden* mandate, the court of appeals, in a later decision, *Berenson v. Town of New Castle*,⁵² held that a municipality is under a duty to consider not only the needs of its own residents, but also the demands of the surrounding region if such is not being provided for in an adequate manner.⁵³ At issue in *Berenson* was a zoning ordinance that refused to permit any multiple-family dwelling development within the Town of New Castle.⁵⁴ The court held that "[i]n enacting a zoning ordinance, consideration must be given to regional needs There must be a balancing of the local desire to maintain the status quo within the community and the greater public interest that regional needs be met."⁵⁵ As a result, on remand, the original ordinance was ruled an invalid exercise of the local zoning authority.⁵⁶

The foregoing cases and discussion present the premise that under New York State zoning practices, exclusion of growth and development is prohibited. Concurrent with this premise, the next section sets forth the traditionally implied belief that local municipalities are obligated to provide their communities with the infrastructure to accommodate this growth.

52. 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975).

53. *Id.* at 111, 341 N.E.2d at 242, 378 N.Y.S.2d at 681.

54. *Id.* at 105, 341 N.E.2d at 239, 378 N.Y.S.2d at 676. The town's zoning ordinance was based on minimum lot sizes. *Id.* None of the town's districts made allowance for development of multiple-family dwellings. *Id.*

55. *Id.* at 110, 341 N.E.2d at 243, 378 N.Y.S.2d at 681.

The court also addressed the need for legislative guidance in matters of zoning: Zoning . . . is essentially a legislative act. Thus, it is quite anomalous that a court should be required to perform the tasks of a regional planner. To that end, we look to the Legislature to make appropriate changes in order to foster the development of programs designed to achieve sound regional planning. While the people of New Castle may fervently desire to be left alone by the forces of change, the ultimate determination is not solely theirs.

Id. at 111, 341 N.E.2d at 243, 378 N.Y.S.2d at 682. Since *Berenson*, the state legislature has remained indifferent to regional planning, and thus the towns and courts are left to debate over its proper application.

56. *Berenson v. Town of New Castle*, No. 73-4239, slip op. (N.Y. Sup. Ct. Dec. 6, 1977), *aff'd in part*, 67 A.D.2d 506, 415 N.Y.S.2d 669 (1979).

IV. Obligation to Accommodate

"[The] obvious purpose [of growth management] is to prevent premature subdivision absent essential municipal facilities and to insure continuous development commensurate with the Town's obligation to provide such facilities."⁵⁷

It is a generally accepted belief that the provision and maintenance of "public" services and facilities is the responsibility of the local government.⁵⁸ In the past, the provision of large federal and state grants and subsidies for roads and sewers created the impression that public services meant government-provided services.⁵⁹ The labels "municipal services" and "public facilities" support the continued inference that they are government-provided and funded. However, there is no constitutional mandate that new facilities, such as education, transportation, and recreation, be underwritten by the general population through increased taxes, rather than by the new residents who created the need for the additional infrastructure.⁶⁰

In New York, this municipal obligation to provide public services may be inferred from the Town Law. Section 263 sets forth the policy behind the state zoning enabling act: "Such regulations shall be made in accordance with a comprehensive plan and designed to . . . facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements"⁶¹ Further, an obligation for the provision of services and facilities has been espoused in language of

57. *Golden v. Planning Bd.*, 30 N.Y.2d 359, 379, 285 N.E.2d 291, 302, 334 N.Y.S.2d 138, 152, *appeal dismissed*, 409 U.S. 1003 (1972).

58. See Larsen & Zimet, *Impact Fees: Et Tu Illinois?*, 21 J. MARSHALL L. REV. 489 (1988). "Many individuals believed then and still do today, that municipalities have an 'obligation' to provide water, sewer and roads in support of growth and development, no matter what the financial implication of that obligation." *Id.* at 489.

59. *Id.* at 490. See, e.g., Bell, *All the King's Horses and All the King's Men* . . . , EPA J., May, 1988, at 13 (a 5% increase in federal tax on motor fuel in 1984 made additional funding possible for highway improvements).

60. Juergensmeyer & Blake, *supra* note 24, at 257.

61. N.Y. TOWN LAW § 263 (McKinney 1987).

the New York courts.

In *Charles v. Diamond*,⁶² a local ordinance requiring new development to connect to the public sewer system was challenged. Because the current municipal system was inadequate to accommodate additional pressure, a developer was prohibited from building until the system was upgraded.⁶³ The court held that such an ordinance, as well as the temporary moratorium on development that it effectuated, was valid provided the delay was reasonable.⁶⁴ The court noted that a municipality is vested with discretion in determining whether construction of municipal improvements is necessary and the form, extent, and location of such improvements.⁶⁵ Delay, as in this case, is justified provided the municipality displays a commitment to the construction and installation of the "necessary improvements."⁶⁶ Also, in *Golden v. Planning Board*,⁶⁷ the court reasoned that when a community undertakes "to provide required municipal services" in a rational manner, courts are rightfully reluctant to strike down such a plan, even if development is temporarily restrained.⁶⁸ Through such language, New York courts have acknowledged that the provision of adequate infrastructure is a necessary obligation of local governing bodies, and require that they affirmatively act to accommodate the need being generated for it.

V. Inadequate Revenues

"As tax bases grow, so do town budgets, and so do tax

62. 41 N.Y.2d 318, 360 N.E.2d 1295, 392 N.Y.S.2d 594 (1977).

63. *Id.* at 323, 360 N.E.2d at 1299, 392 N.Y.S.2d at 599.

64. *Id.* at 324, 360 N.E.2d at 1300, 392 N.Y.S.2d at 599.

65. *Id.* at 326, 360 N.E.2d at 1303, 392 N.Y.S.2d at 601.

66. *Id.* at 326, 360 N.E.2d at 1301, 392 N.Y.S.2d at 601.

67. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972).

68. *Id.* at 379, 285 N.E.2d at 302, 334 N.Y.S.2d at 153. *Accord* Robert Muellers Assocs. v. Zoning Hearing Bd., 30 Pa. Commw. 386, 373 A.2d 1173 (1977) (the primary responsibility for providing improvements and services lies with local governments, but reasonable fees may be imposed to cushion municipalities from the effects of rapid growth).

*rates for individual residents.*⁶⁹

In light of the mandate against exclusion, the obligation to actively provide public services and infrastructure to accommodate the pattern of increasing growth and development has placed a major burden on local government revenues.⁷⁰ Traditionally, the federal government has played a significant role in funding infrastructure and public services through special taxes, trust funds, and various construction grant programs.⁷¹ For example, a 1984 federal tax increase of 5% on gasoline created increased revenues for highway development.⁷² However, studies have shown that public works expenditures at all levels of government have dropped from 20% in 1950, to 7% in 1984.⁷³ Additionally, since 1960, vehicle miles travelled per dollar of public spending have increased by 3.5% annually, further suggesting that the public sector is not spending enough to meet growing transportation needs.⁷⁴

This trend has been amplified in recent years by the Gramm-Rudman-Hollings federal budget balancing amendments of 1985 and 1987.⁷⁵ The resulting federal spending re-

69. Hoagland, *Does Expanding the Tax Base Really Cut Taxes?*, DUTCHESS LAND CONSERVANCY NEWS (Winter 1987).

70. See *id.* See also COST OF COMMUNITY SERVICES STUDY, *supra* note 26; Bell, *supra* note 59.

71. Delaney, Gordon & Hess, *The Needs-Nexus Analysis: A Unified Test for Validating Subdivision Exactions, User Impact Fees and Linkage*, 50 LAW & CONTEMP. PROBS. 139, 140 (1987). See also Weschler, Mushkatel & Frank, *Politics & Administration of Development Exactions*, in DEVELOPMENT EXACTIONS 15, 16 (J. Frank & R. Rhodes eds. 1987); Lamb, *Financing Regional Infrastructure*, 11 A.B.A. SEC. URB., ST. & LOC. L. NEWSL. 19 (1987).

72. Bell, *supra* note 59, at 13. See Delaney, Gordon & Hess, *supra* note 71, at 140 (other federally subsidized programs include: the EPA Grant Program for Construction of Waste Water Treatment Facilities, the Economic Development Administration Public Works Program, the Department of Housing and Urban Development Community and Urban Development Grant Programs and housing subsidy programs, the Department of Transportation highway programs, and the Urban Mass Transit Administration programs for public transit).

73. *Financing America's Public Infrastructure: Issues for Local Governments*, 22 AKRON L. REV. 381 (1989) [hereinafter *Financing America's Public Infrastructure*].

74. Bell, *supra* note 59, at 13-14.

75. Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037 (1985), amended by the Balanced Budget and Emergency Deficit

duction scheme indicates that federal aid for construction programs has taken a back seat to the so-called higher priorities of defense, the annual deficit, and decreasing the national debt.⁷⁶

A recent report of the National Council on Public Works Improvement adds perspective to the continuing decrease in capital spending.⁷⁷ The Council declared that the quality of America's infrastructure is barely adequate to fulfill current requirements and is insufficient to meet the demands of future economic growth and development.⁷⁸ The report recommends an increase in capital spending by as much as 100% to be shared by all levels of government and the private sector.⁷⁹ The report also calls for a larger share of the cost to come from those who benefit from the services.⁸⁰

The foregoing analysis demonstrates the dilemma posed by increasing needs for infrastructure concurrent with decreasing public funding. Together with the demand for growth and the need to accommodate it, a great burden has been placed on the steps of local government.⁸¹

The major source of local government revenues are property taxes, including the town tax, village tax, fire tax, and other special assessments.⁸² Other sources include state revenue sharing and various miscellaneous local fees and

Control Reaffirmation Act of 1987, Pub. L. No. 100-119, 101 Stat. 754 (1987)(codified as amended at 2 U.S.C. §§ 901-922 (1988)).

76. J. Duncan, T. Morgan & N. Standerfer, *Simplifying and Understanding the Art and Practice of Impact Fees* 1 (March 1986)(available from Pace Environmental Law Review). See also Lamb, *supra* note 71, at 19.

77. NATIONAL COUNCIL ON AMERICA'S PUB. WORKS, *FRAGILE FOUNDATIONS: A REPORT ON AMERICA'S PUBLIC WORKS* (1988), reviewed by, Bell, *supra* note 59, at 13.

78. Bell, *supra* note 59, at 13.

79. *Id.* at 15.

80. *Id.*

81. J. Duncan, T. Morgan & N. Standerfer, *supra* note 76, at 1. See Lamb, *supra* note 71, at 19. See also 2 NEW YORK LEGISLATIVE COMM'N ON STATE-LOCAL RELATIONS, *STATE-LOCAL ISSUE BRIEF, ALTERNATIVE REVENUE SOURCES FOR LOCAL GOVERNMENTS* 1 (Feb. 1989)(all classes of local government now raise at least 70% of their total revenues from their own sources).

82. COST OF COMMUNITY SERVICES STUDY, *supra* note 26, at 2. Such taxes are generally levied on an *ad valorem* basis, or according to property value. *Financing America's Public Infrastructure*, *supra* note 73, at 382. See also BLACK'S LAW DICTIONARY 51 (6th ed. 1990).

charges.⁸³ Capital infrastructure projects are mainly financed with general obligation bonds issued by municipalities and secured by levies on local property taxes.⁸⁴ As the need for infrastructure increases, it is evident that an increase in property tax revenues, to secure more bonds, will be warranted. Presently, however, in most municipalities, such potential tax hikes are politically unpopular.⁸⁵

Proponents of new development claim that tax revenues from such development will expand the local tax base, thereby reducing the tax rate and the burden on individual taxpayers.⁸⁶ However, this has generally not been an accurate assumption. Studies have shown that expenditures for services to accommodate growth are increasing faster than the additional increase in the tax base. For example, an analysis of Hudson Valley towns from 1975 to 1985 showed a 20-25% increase in the tax base (total valuation of taxable property), while showing a 100-125% increase in town budgets, which in turn created a 45-75% increase in town tax rates.⁸⁷ Other

83. COST OF COMMUNITY SERVICES STUDY, *supra* note 26, at 3. Miscellaneous local revenues include: interest-penalties on taxes, special franchises, clerk's fees, animal licenses, landfill tickets, recreational fees, interest and earnings, justice revenues, and garbage disposal fees. *Id.* at 6.

84. *Financing America's Public Infrastructure*, *supra* note 73, at 383. The security for all general obligation bonds must be the ability of the municipality to earn, or to raise by taxation, sufficient funds to pay the interest and principal on its debt. W. VALENTE, LOCAL GOVERNMENT LAW 640 (1980).

85. After the recent decision in Albany Area Builders Association v. Town of Guilderland, 74 N.Y.2d 372, 546 N.E.2d 920, 547 N.Y.S.2d 627 (1989), which invalidated a transportation impact fee ordinance, the Town of Guilderland sought to finance highway improvements through appropriation of a bond and capital notes program. The required voter referendum was handily defeated at the polls and the highway project has since been canceled. The borrowing plan in the referendum would have cost taxpayers \$44 per household for fifteen years, compared to only \$7 if the impact fee ordinance was upheld. Sanford, *Bypass goes down hard*, *Altamont Enterprise*, Nov. 11, 1989, at 1, col. 3. Similarly, a two billion dollar environmental bond act, proposed by Governor Cuomo and the New York State Legislature, to pay for environmental projects, was defeated at the polls on November 6, 1990. Explanation for this loss was attributed to widespread concern for the state's financial condition. N.Y. Times, Nov. 7, 1990, at B7, col. 5.

86. Hoagland, *supra* note 69.

87. *Id.* For example, in the Town of New Windsor, Orange County, which is experiencing rapid commercial and residential growth, the tax base increased 16% while the town budget rose 175% and the tax rate increased 140%. *Id.*

sources of local government revenues have been unable to pick up the slack, which is evidenced by municipalities running close to or at a deficit.⁸⁸

This ever-widening gap between capital expenditure needs and limited fiscal resources, compounded further by decreasing federal and state allocations and unfavorable response to tax increases, is providing impetus for alternative financing mechanisms at the local government level.⁸⁹ To this end, many municipalities have attempted to distribute some of this burden onto those being accommodated, the developers, who have created the need for additional municipal services.⁹⁰ Without effective cost-shifting mechanisms, local governments bear the principal cost of improvements, while the developer benefits from subsidies by the general public who, in reality, are providing the infrastructure assets for the developer's private enterprise.⁹¹

The rationale for shifting these costs was aptly stated by the court of appeals in *Golden v. Planning Board*:⁹² "Every restriction on the use of property entails hardships for some individual owners. Those difficulties are invariably the product of police regulation and the pecuniary profits of the individual must in the long run be subordinated to the needs of

88. COST OF COMMUNITY SERVICES STUDY, *supra* note 26, at 6. The 1988 town budget from the Town of North East, Dutchess County, displayed total revenues at \$2,165,191, with total expenditures of \$2,331,246; the Town of Beekman, also in Dutchess County, had a total revenue of \$5,241,913, with total expenditures of \$5,197,973. These figures were also broken down by land uses. In North East, revenues from residential uses were \$1,607,739, while expenditures for the same uses were listed as \$2,178,523. In Beekman, revenues from residential uses were \$4,500,031, while expenditures were \$5,036,152. The latter figures demonstrate that the residential sector is demanding more in services than it is contributing in revenues. *Id.* at 7.

89. Morgan, Duncan & McClendon, *supra* note 7, at 50.

90. See Juergensmeyer & Blake, *supra* note 24, at 247.

91. Levy, *Impact Fees, Concurrence and Reality: A Proposal for Financing Infrastructure*, 21 URB. LAW. 471, 474 (1989). In effect, developers can also dictate the infrastructure needs and schedule for construction thereof without consideration of the local government's willingness or ability to pay for such improvements. *Id.* See also Juergensmeyer & Blake, *supra* note 24, at 248 (developers reap a windfall since it is the infrastructure such as schools, recreation facilities, fire protection, etc. that he sells to his customers).

92. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972).

the community.”⁹³ The following section analyzes various cost-shifting, growth-management mechanisms attempted by New York State municipalities. Included are park land dedication and in-lieu fees,⁹⁴ intradevelopment exactions,⁹⁵ special improvement districts,⁹⁶ sequenced-growth plans with voluntary impact fees,⁹⁷ and impact fee ordinances.⁹⁸ Each has been met with varied judicial and legislative response.

VI. Growth Management Mechanisms

*“Towns, cities, and villages lack the power to enact or enforce zoning or land use regulations. . . . The exercise of that power, to the extent it is lawful, must be founded upon a legislative delegation to so proceed, and in the absence of such a grant will be held ultra vires and void.”*⁹⁹

Expounded by the court of appeals in *Golden v. Planning Board*,¹⁰⁰ these words have become the proverbial threshold for local municipalities as they seek justification for growth management practices to relieve the burden of accommodating future development. Generally, suburban municipal law-making authority is found in the Municipal Home Rule Law¹⁰¹ and the Statute of Local Governments.¹⁰² Further, the legislature has delegated a portion of its police power authority for zoning and planning purposes to local governments in the Town Law,¹⁰³ and the Village Law.¹⁰⁴ Unfortunately, in

93. *Id.* at 381, 285 N.E.2d at 304, 334 N.Y.S.2d at 154.

94. *See infra* notes 107-132 and accompanying text.

95. *See infra* notes 126-127 and accompanying text.

96. *See infra* notes 133-164 and accompanying text.

97. *See infra* notes 165-172 and accompanying text.

98. *See infra* notes 173-238 and accompanying text.

99. *Golden v. Planning Bd.*, 30 N.Y.2d 359, 369-70, 285 N.E.2d 291, 296, 334 N.Y.S.2d 138, 145, *appeal dismissed*, 409 U.S. 1003 (1972).

100. *Id.* at 359, 285 N.E.2d 291, 334 N.Y.S.2d 138.

101. *See* N.Y. MUN. HOME RULE LAW § 10 (McKinney 1969 & Supp. 1991).

102. *See* N.Y. STAT. LOCAL GOV'TS LAW § 10 (McKinney 1969). *See also* N.Y. CONST. art. IX, § 1, 2.

103. *See* N.Y. TOWN LAW §§ 261-284 (McKinney 1987 & Supp. 1991).

104. *See* N.Y. VILLAGE LAW §§ 7-700 to -742 (McKinney 1973 & Supp. 1991).

these delegations, the state legislature has provided little statutory guidance for addressing many of the emerging issues of growth management.

Sections 276 and 277 of the Town Law grant town planning boards the authority to require developers to provide park land and on-site exactions as prerequisites to subdivision approval.¹⁰⁵ Section 190 of the Town Law enables municipalities to create special improvement districts as an alternative funding and organizational mechanism for capital projects.¹⁰⁶ Outside of these explicit and limited provisions, statutory authority for accommodating growth is somewhat general and vague. This lack of explicit authority has created an arena for trial-and-error lawmaking, with the state judiciary interpreting and defining the metes and bounds of these local powers.

A. *Park Land, In-Lieu Fees, & Exactions*

Through Town Law sections 276 and 277, the state legislature has delegated direct authority to town planning boards for subdivision control.¹⁰⁷ This enables the planning board to regulate new development through an application and permit process. This power is vitally important to exurban municipalities where a majority of the land is yet undeveloped. Since municipalities are subject to the judicially-created mandate against exclusion,¹⁰⁸ the permitting authority of sections 276 and 277 cannot be used as a tool to prohibit development. However, it does enable planning boards to impose certain conditions on permit approval. Section 276 sets forth the policy behind this control: "For the purpose of providing for the future growth and development of the town and affording adequate facilities for the housing, transportation, distribution, comfort, convenience, safety, health and welfare of its

105. N.Y. TOWN LAW §§ 276, 277 (McKinney 1987); *accord* N.Y. VILLAGE LAW § 7-730 (McKinney 1973).

106. N.Y. TOWN LAW § 190 (McKinney 1987).

107. N.Y. TOWN LAW §§ 276, 277 (McKinney 1987). *See also* Melli, *Subdivision Control in Wisconsin*, 1953 WIS. L. REV. 389 (1953) ("Subdivision control, the regulation of the division of raw land into building lots, is a vital component of land-use control.").

108. *See supra* notes 33-56 and accompanying text.

population. . . ."¹⁰⁹

Section 277 includes the specific conditions that boards are authorized to exact from permittee developers.¹¹⁰ To preserve open space and provide for future recreational needs of the community, developers may be required to show, on their subdivision plats, available space dedicated to park land.¹¹¹ At the discretion of the planning board, if suitable land does not exist on the subdivision plat, it may require the developer to pay a fee in lieu of park land.¹¹² This fee is then placed in a trust fund to be used exclusively for creation of local parks within the community.¹¹³

Provision of land, or a fee in lieu thereof, has been widely held a valid condition on subdivision approval in New York.¹¹⁴ This authority was originally validated by the judiciary in the court of appeals decision of *Jenad, Inc. v. Village of Scarsdale*.¹¹⁵ The park land or in-lieu fee exaction in the Scarsdale ordinance was based on the enabling authority of former Village Law section 179-1,¹¹⁶ which mirrors Town Law section 277.¹¹⁷ The developer in this case challenged the fee as an unauthorized tax, claiming the payments were for general government purposes and, therefore, the local government had no authority to collect such a tax.¹¹⁸ Ruling the statute constitutional, the court held that such a fee was "not a tax . . . but a reasonable form of village planning for the general community

109. N.Y. TOWN LAW § 276 (McKinney 1987).

110. N.Y. TOWN LAW § 277 (McKinney 1987).

111. N.Y. TOWN LAW § 277(1) (McKinney 1987).

112. *Id.*

113. *Id.*

114. See generally *Jenad, Inc. v. Village of Scarsdale*, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966); *Weingarten v. Town of Lewisboro*, 144 Misc. 2d 849, 542 N.Y.S.2d 1012 (Sup. Ct. 1989), *aff'd*, 160 A.D.2d 668, 559 N.Y.S.2d 807, *appeal dismissed*, 76 N.Y.2d 934, 564 N.E.2d 670, 563 N.Y.S.2d 60 (1990); *Kessler v. Town of Shelter Island Planning Bd.*, 40 A.D.2d 1005, 338 N.Y.S.2d 778 (1972); *East Neck Estates, Ltd. v. Luchsinger*, 61 Misc. 2d 619, 305 N.Y.S.2d 922 (Sup. Ct. 1969).

115. 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966).

116. N.Y. VILLAGE LAW OF 1909 § 179-1, *repealed by* N.Y. VILLAGE LAW § 7-730 (McKinney 1973).

117. N.Y. TOWN LAW § 277 (McKinney 1987).

118. 18 N.Y.2d at 84, 218 N.E.2d at 676, 271 N.Y.S.2d at 958.

good.”¹¹⁹

More recently, the park land and fee provision of section 277 survived a challenge in the case of *Weingarten v. Town of Lewisboro*.¹²⁰ The New York Supreme Court, Westchester County, held that the preservation of park land is a legitimate state interest and that since a subdivision contributes to the need for more park land, an ordinance created under section 277 substantially advances that interest and is therefore valid.¹²¹ Relying on the United States Supreme Court decision in *Nollan v. California Coastal Commission*,¹²² the court noted that the new standard to be applied in this situation is more strict, replacing the rational relationship standard of review applied in *Jenad*.¹²³ The *Weingarten* decision was affirmed by the appellate division,¹²⁴ and a further appeal was dismissed by the court of appeals.¹²⁵

Along with land for parks, section 277(1) also provides authority to exact on-site improvements from the developer as a condition on permit approval.¹²⁶ In the alternative, the de-

119. *Id. Cf. Gulest Assocs. Inc. v. Town of Newburgh*, 25 Misc. 2d 1004, 209 N.Y.S.2d 729 (Sup. Ct. 1960), *aff'd*, 15 A.D.2d 815, 225 N.Y.S.2d 538 (1962). In *Gulest*, the appellate division affirmed the invalidation of a statute providing for park and recreation fees in lieu of dedication of land as a condition to subdivision approval. The court found the statute permitted a taking of property and was an improper delegation of authority by the state legislature. *Id. Gulest* was expressly overruled by the court of appeals in *Jenad*. 18 N.Y.2d at 84, 218 N.E.2d at 675, 271 N.Y.S.2d at 957.

120. 144 Misc. 2d 849, 542 N.Y.S.2d 1012 (Sup. Ct. 1989), *aff'd*, 160 A.D.2d 668, 559 N.Y.S.2d 807, *appeal dismissed*, 76 N.Y.2d 934, 564 N.E.2d 670, 563 N.Y.S.2d 60 (1990)(town ordinance imposed a \$5,000 per lot fee in lieu of park land).

121. *Weingarten*, 144 Misc. 2d at 857, 542 N.Y.S.2d at 1017.

122. 483 U.S. 825 (1987). The Supreme Court ruled that a condition imposed on development must substantially advance legitimate state interests. *Id.* at 841.

123. *Weingarten*, 144 Misc. 2d at 857, 542 N.Y.S.2d at 1017. *See Jenad*, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966)(discussed *supra* notes 115-119).

124. 160 A.D.2d 668, 559 N.Y.S.2d 807 (1990).

125. 76 N.Y.2d 934, 564 N.E.2d 670, 563 N.Y.S.2d 60 (1990)(the court of appeals deferred consideration of this appeal pending the outcome of the remand in the companion case of *Bayswater Realty & Capital Corp. v. Planning Bd.*, 76 N.Y.2d 460, 560 N.E.2d 1300, 560 N.Y.S.2d 623 (1990)).

126. N.Y. TOWN LAW § 277(1) (McKinney 1987)(exactions may include paved streets, street signs, sidewalks, street lighting standards, curbs, gutters, street trees, water mains, fire alarm signal devices, sanitary sewers, and storm drains). *See also* Connors & High, *The Expanding Circle of Exactions: From Dedication to Linkage*,

veloper may post a performance bond with the planning board sufficient to cover the costs of such improvements, thereby guaranteeing their provision.¹²⁷

In reviewing the use of section 277 to condition subdivision approval upon provision of park land, fees in lieu thereof, and intradevelopment exactions, the courts have generally required only a reasonable relationship to the community welfare as the standard for validation.¹²⁸ The *Weingarten* decision may have increased the government's burden regarding in-lieu fees somewhat.¹²⁹ Either way, with such a deferential and easily met standard, Town Law section 277 is an increasingly important source of cost-shifting authority available to local governments.

Until recently, this authority was strictly limited only to the approval of subdivisions.¹³⁰ Current trends indicate that the courts are becoming more willing to extend section 277

50 LAW & CONTEMP. PROBS. 69, 70 (1987) ("An exaction is essentially a condition of carrying forward a project in the form of a contribution made by a developer to a municipality The most common type of exaction is an intradevelopmental dedication of land for streets, sidewalks, water and sewer lines, and land for recreational or educational purposes.").

127. N.Y. TOWN LAW § 277(1) (McKinney 1987). See *Coates v. Planning Bd.*, 58 N.Y.2d 800, 802, 445 N.E.2d 642, 643, 459 N.Y.S.2d 259, 260 (1983) ("It was reasonable . . . in the interest of promoting the health and welfare of the community, to require that [the developer] provide facilities to insure proper drainage of their property as a condition for approval of their subdivision plat."). See also *Brous v. Smith*, 304 N.Y. 164, 170, 106 N.E.2d 503, 506-07 (1952) (intra-development exactions authorized as "reasonable conditions designed for the protection both of the ultimate purchasers of the homes and of the public").

128. See *id.* and text accompanying note 119.

129. See *supra* notes 121-123 and accompanying text.

130. See *Riegert Apartments Corp. v. Planning Bd.*, 57 N.Y.2d 206, 441 N.E.2d 1076, 455 N.Y.S.2d 558 (1982). The court of appeals held that although a town may require either land or money in lieu of land for park development as a condition for approval of a subdivision plat, it may not so condition approval of a site plan. *Id.* at 211-12, 441 N.E.2d at 1079, 455 N.Y.S.2d at 561. Authority to approve site plans is located in section 274-a of the Town Law. N.Y. TOWN LAW § 274-a (McKinney 1987). This section contains no provision for conditioning approval such as section 277. See also *Kamhi v. Planning Bd.*, 59 N.Y.2d 385, 452 N.E.2d 1193, 465 N.Y.S.2d 865 (1983) (the court refused to extend the authority of section 277 to the approval of cluster developments which are governed by section 281); *Kanaley v. Brennan*, 119 Misc. 2d 1003, 1012, 465 N.Y.S.2d 130, 135 (Sup. Ct. 1983) ("There is absolutely no authority under Section 281-a of the Town Law for the acceptance of a cash payment in lieu of open space for recreational purposes.").

authority regarding park land and in-lieu fees to most development permit approvals under article 16 of the Town Law, including site plan and cluster development approvals.¹³¹

However, this section is limited in that it only shifts liability for the provision of park land and on-site infrastructure. The rationale of providing for the community welfare, espoused in both *Jenad* and *Weingarten*, to justify these exactions, has failed to be successfully applied to conditioning development permits on the provisions of off-site capital improvements.¹³² To meet the demands for these improvements, local governments have relied on the creation of special improvement districts.

B. *Special Improvement Districts*

One way that local revenue may be raised for off-site capital projects, without burdening the entire municipality with the cost, is through the creation of special improvement districts. Article 12 of the Town Law authorizes the establishment of various districts for the provision of improvements or services in such district wholly at the expense of the district.¹³³ These improvements are funded through special as-

131. See *Kamhi v. Town of Yorktown*, 74 N.Y.2d 423, 547 N.E.2d 346, 548 N.Y.S.2d 144 (1989)(the court of appeals held that municipalities may supersede section 277 to extend the park land and in-lieu fee condition to approval of site plans under Town Law section 261). See also *Bayswater Realty & Capital Corp. v. Planning Bd.*, 76 N.Y.2d 460, 468, 560 N.E.2d 1300, 1304, 560 N.Y.S.2d 623, 627 (1990)(the court of appeals held that if a planning board makes a determination pursuant to Town Law section 277(1) that additional recreational land is needed by the town, and that such need will not be satisfied by open lands created within the plat itself, the board may demand the substitutional monetary payment pursuant to Town Law section 277(1), even though, under the authority of Town Law section 281(b), it is also requiring the developer to set aside the open lands resulting from the cluster).

132. Cf. 49 Op. N.Y. Att'y Gen. 105 (1986)("A town is authorized to require as a condition of subdivision approval, that a developer contribute toward the costs of needed firefighting services and facilities. Such a charge constitutes a fee, not a tax.").

133. N.Y. Town Law art. 12, §§ 190 to 208-a (McKinney 1987 & Supp. 1991). Section 190 provides:

[T]he town board of any town may establish or extend in said town a sewer, drainage, water, water quality treatment, park, public parking, lighting, snow removal, water supply, sidewalk, a fallout shelter district or refuse and garbage district, aquatic plant growth control district, and in any town bordering upon or containing within its boundaries any navigable waters of this state, a

sessments, or taxes, which are charges levied against real property particularly and directly benefitted by the local improvements.¹³⁴

Individual districts are established after submission of a signed petition,¹³⁵ and a hearing, resolution, and order of the town board pursuant to the procedures set forth in section 194.¹³⁶ The petition states the maximum amount proposed to be expended for the improvements.¹³⁷ Expenses are raised for establishment and improvements within these districts in one of two ways. The expense of the establishment of a sewer, sewage disposal, waste-water disposal, drainage, or water-quality treatment district are to be borne by local assessment upon the several lots within the district which the board determines are especially benefitted, in proportion to the amount of benefit which the improvement will confer on it.¹³⁸ Alternatively, expenses for the establishment of a park, public parking, water, lighting, snow removal, sidewalk, refuse and garbage, aquatic plant growth control districts, harbor improvement districts, public dock districts, fallout shelter districts, or beach improvement districts are to be assessed, levied, and collected from the several lots within the district for each purpose in the same manner and at the same time as other town charges.¹³⁹ Such assessments must also proportionately reflect the benefit which each lot will derive therefrom.¹⁴⁰

However, there are limitations to the district mechanism. The districts are restricted to specific areas¹⁴¹ and project

harbor improvement district, a public dock district, or beach erosion control district. . . .

Id. § 190.

134. Morgan, Duncan & McClendon, *supra* note 7, at 51.

135. N.Y. TOWN LAW § 191 (McKinney 1987).

136. N.Y. TOWN LAW § 194 (McKinney 1987).

137. N.Y. TOWN LAW § 191 (McKinney 1987).

138. N.Y. TOWN LAW § 202(2) (McKinney 1987).

139. N.Y. TOWN LAW § 202(3) (McKinney 1987).

140. *Id.*

141. See *Kenwell v. Lee*, 261 N.Y. 113, 184 N.E. 692 (1933) (the legality of creating a water district which covers the entire area of a town is doubtful).

types.¹⁴² Special assessments cannot be levied unless all the property and property owners within the proposed district are specially benefitted thereby in a manner differing from the general public benefit,¹⁴³ and all the property and property owners benefitted are included within the limits of the proposed district.¹⁴⁴ Since the creation of a district, and increases in the maximum amount to be expended therefor, both require a petition signed by at least fifty percent of the resident property owners in the district,¹⁴⁵ such mechanisms will be less popular in times of financial strain.¹⁴⁶ Further, since a large portion of these charges are levied on an *ad valorem* basis upon current residents of the district, none of the additional costs created to accommodate new development are shifted to developers and the future residents.

C. *Special Home Rule Request*

Article 12 of the Town Law does not provide for the creation of traffic improvement districts.¹⁴⁷ However, after the re-

142. There is no provision for districts to raise revenues for schools, highways, police and fire protection, libraries, and other community services. See N.Y. TOWN LAW § 190 (McKinney 1987); *Kent Dev., Inc. v. Town of North Castle*, No. 87-022804, slip op. (N.Y. Sup. Ct. Nov. 4, 1988); see also 1986 Op. N.Y. St. Compt. No. 53 (Aug. 13, 1986); 1981 Op. N.Y. St. Compt. No. 353 (Oct. 26, 1981); 34 Op. N.Y. St. Compt. 171 (1978)(there is no authorization for the creation of a highway or road district similar to a sewer, water, or other district authorized by Town Law section 190).

143. N.Y. TOWN LAW § 194(1)(b) (McKinney 1987). See also Morgan, Duncan & McClendon, *supra* note 7, at 51.

144. N.Y. TOWN LAW § 194(1)(c) (McKinney 1987).

145. N.Y. TOWN LAW §§ 191, 202-d (McKinney 1987).

146. A Pennsylvania report on the use of transportation districts to raise needed revenues for roadway improvements noted that the issue of assessing existing residential development was politically unpopular and would continue to play a limiting factor in the use of transportation districts. DELAWARE VALLEY PLANNING COMM'N, IMPLEMENTATION OF TRANSPORTATION PARTNERSHIPS IN SOUTHEASTERN PENNSYLVANIA 10-11 (Apr. 1988)(available from the Delaware Valley Regional Planning Commission, 21 South Fifth Street, Philadelphia, Pa. 19106)[hereinafter TRANSPORTATION PARTNERSHIPS].

147. See *supra* note 142. Conversely, the New Jersey Legislature recently passed the New Jersey Transportation Development District Act of 1989 which authorizes the creation of districts located in high growth areas and the assessment of fees to pay for transportation improvements within these districts. N.J. Transportation Development District Act of 1989, N.J. STAT. ANN. §§ 27:1C-1 to -18 (West Supp. 1990); see also Transportation Partnership Act, PA. CONS. STAT. ANN. tit. 53, §§ 1621-1626

cent invalidation of the Armonk Traffic/Roadway Improvement Impact Area (ATRIIA),¹⁴⁸ the Town of North Castle petitioned the New York State Legislature for special enabling legislation to create a traffic improvement facilitation district.¹⁴⁹ Under article 5, section 40 of the Municipal Home Rule Law, local governments are presented with the opportunity to make a home rule request to the state legislature for a "specific bill relating to the property, affairs or government of such local government which does not in terms and in effect apply alike to all [other municipalities]. . . ."¹⁵⁰ Such a bill was drafted, submitted, and the state legislature created the Town of North Castle Development Facilitation Improvement District by statute on July 16, 1989.¹⁵¹ The law authorizes the town to appropriate, collect, and expend money for the reconstruction and improvement of the district highway system and local roads.¹⁵² The procedural provisions to be followed are similar to those set forth in Town Law article 12.¹⁵³ The costs of the improvements are to be raised through the imposition of fees upon all lots and parcels within the district in proportion to the benefit derived therefrom.¹⁵⁴ This assessment ap-

(Purdon Supp. 1990).

148. *Kent Dev., Inc. v. Town of North Castle*, No. 87-022804, slip op. (N.Y. Sup. Ct. Nov. 4, 1988)(discussed *infra* notes 185-191 and accompanying text).

149. *North Castle Traffic Impact Fee Legislation Passes Legislature*, Impact, Aug. 1989, at 8, col. 1.

150. N.Y. MUN. HOME RULE LAW § 40 (McKinney 1969). Section 40 states: The elective or appointive chief executive officer . . . with the concurrence of the legislative body of such local government, or the legislative body by a vote of two-thirds of its total voting power without the approval of such officer, may request the legislature to pass a specific bill relating to the property, affairs or government of such local government which does not in terms and in effect apply alike to all counties, . . . all cities, all towns or all villages, as the case may be. Every such request shall declare that a necessity exists for the passage of such bill by the legislature and shall recite the facts establishing such necessity.

Id. Authority for this provision is found in N.Y. CONST. art. IX, § 2.

151. 1989 N.Y. Laws ch. 452.

152. *Id.* § 1.

153. *Id.* See also N.Y. TOWN LAW §§ 190 to 208-a (McKinney 1987 & Supp. 1991).

154. 1989 N.Y. Laws ch. 452, § 2. See also N.Y. TOWN LAW § 202(2) (McKinney 1987).

plies to both existing and new development.¹⁵⁵ However, this special legislation contains certain unique provisions.

First, the act permits the establishment of an escrow account for the improvement funds to be controlled by the municipality.¹⁵⁶ This account is to be held in trust solely for the purpose of financing and paying the costs and expenses attributable to the district improvements.¹⁵⁷

Second, to determine the fees or assessments, based on derived benefit, the board is to take into account which parcels significantly contribute to the traffic congestion to be remedied by the improvements.¹⁵⁸ This provision grants broad discretionary authority to the town board. If this district is created in an area facing new development pressures, it would seem that the planning board has the discretion to apportion a greater charge on the new development, as contributing significantly more of the problem to be alleviated through district funding, than existing residents. It is also interesting to note that the intended purpose of ATRIIA, which was originally declared invalid by the courts, and then later served as the basis for this special state legislation, was to impose an "impact fee" on all new commercial and multi-family development.¹⁵⁹ Use of the special home rule request mechanism may have created a way around the invalidation of roadway impact fee ordinances. It remains to be seen how the Town of North Castle will proportion the fees and how much of a burden new development will incur.

Comparable special state legislation was also enacted at the request of the Town of Greenburgh, Westchester County,¹⁶⁰ the Town of South East, Putnam County,¹⁶¹ and

155. 1989 N.Y. Laws ch. 452. "The costs and expenses . . . shall be raised through levy of special assessments upon all lots . . . within such improvement district" *Id.* § 1.

156. 1989 N.Y. Laws ch. 452, § 5.

157. *Id.*

158. *Id.* § 2.

159. See *Kent Dev., Inc. v. Town of North Castle*, No. 87-022804, slip op. at 15-16 (N.Y. Sup. Ct. Nov. 4, 1988).

160. 1984 N.Y. Laws ch. 723.

161. 1990 N.Y. Laws ch. 571.

the Town of Ulster, Ulster County.¹⁶² If a trend in this area develops, the New York State Legislature may be compelled to amend article 12 of the Town Law¹⁶³ in order to set uniform standards and procedures.¹⁶⁴

D. Growth/Improvement Sequencing

Town Law section 261 delegates the state's police power authority, in the area of zoning, to local municipalities.¹⁶⁵ This section permits town planning boards to create local ordinances to restrict and regulate population density and the size, location, and use of buildings and land for the purpose of promoting the health and welfare of the community.¹⁶⁶

This authority was creatively applied as a growth management tool by the Town of Ramapo. As noted in Section III, in the case of *Golden v. Planning Board*,¹⁶⁷ the New York Court of Appeals validated the town's use of section 261 to create a zoning ordinance that timed subdivision approval with the availability of necessitated public facilities.¹⁶⁸ As a result, the town was able to slow the pace of growth and development to allow the concurrent provision of necessary municipal services and infrastructure.¹⁶⁹

As in *Golden*, where the ordinance was directly linked to an eighteen-year capital improvement schedule, such a device

162. 1990 N.Y. Laws ch. 521.

163. Just such an amendment was introduced in the legislature in 1989, but failed to gain support. S. 5150, 1989 N.Y. St. Leg., Reg. Sess. (1989).

164. *Moriarty v. Planning Bd.*, 119 A.D.2d 188, 192, 506 N.Y.S.2d 184, 186-87 (1986)(through enactment of Town Law section 274-a, the state legislature repealed the piecemeal legislative authority granted municipalities to regulate site plan approvals), *appeal denied*, 69 N.Y.2d 603, 504 N.E.2d 396, 512 N.Y.S.2d 1026 (1987).

165. N.Y. TOWN LAW § 261 (McKinney 1987); *accord* N.Y. VILLAGE LAW § 7-700 (McKinney 1973). See *McMinn v. Town of Oyster Bay*, 111 Misc. 2d 1046, 1057, 445 N.Y.S.2d 859, 867 (1981)("[P]olice power resides within the state and is delegated by it, insofar as zoning is concerned, to the town."), *aff'd as modified on other grounds*, 105 A.D.2d 46, 482 N.Y.S.2d 773 (1984), *aff'd*, 66 N.Y.2d 544, 488 N.E.2d 1240, 498 N.Y.S.2d 128 (1985).

166. N.Y. TOWN LAW § 261 (McKinney 1987).

167. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972)(discussed *supra* notes 41-51 and accompanying text).

168. *Id.* at 371, 285 N.E.2d at 297, 334 N.Y.S.2d at 146.

169. *Id.*

may effectuate an authorized moratorium on development.¹⁷⁰ This authority must necessarily be inferred from the Town Law since the imposition of a moratorium on development is nowhere mentioned in the statute. Left unanswered by cases like *Golden* and *Charles v. Diamond*, however, is the issue of what length of time constitutes a valid, reasonably limited, or temporary moratorium.¹⁷¹

Interestingly, the Ramapo plan provided developers with an alternative to bypass the moratorium. Developers were permitted to accelerate permit approval by providing funds for the required municipal facilities.¹⁷² In effect, this provision created a voluntary impact fee which was upheld by the New York Court of Appeals.

Slowing the pace of development, through a plan such as the one in Ramapo, enables towns to spread the cost of providing additional services over time. However, aside from the

170. *Id.* See also *Charles v. Diamond*, 41 N.Y.2d 318, 324, 360 N.E.2d 1295, 1300, 392 N.Y.S.2d 594,599 (1977) ("The municipal power to act in furtherance of the public health and welfare may justify a moratorium on building permits or sewer attachments which are reasonably limited as to time."). See *supra* notes 62-66 and accompanying text.

171. "Temporary restraints necessary to promote the over-all public interest are permissible. Permanent interference with the reasonable use of private property for the purpose for which it is suited is not." *Charles v. Diamond*, 41 N.Y.2d at 324, 360 N.E.2d at 1300, 392 N.Y.S.2d at 599.

Remedial action aimed at environmental problems caused by excessive growth may also effect development moratoria. For example, a recent federally-sponsored study of the degradation of the water quality of Long Island Sound has determined that excessive nutrients from sewage treatment plant discharges are the major contributing factor. LONG ISLAND SOUND STUDY, STATUS REPORT AND INTERIM ACTIONS FOR HYPOXIA MANAGEMENT 10 (Dec. 1990). It was also disclosed that most of the sewage treatment plants in the Sound's watershed are at or over capacity, and that this is due to the extensive growth and development in these areas. *Id.* at 27. In attempts to slow the degradation of the Sound, the study recommends setting baseline amounts of nutrient discharges from the sewage treatment plants. Plants would be held to this limit by state enforcement. *Id.* at 34. As a result of this limit, plants would not be able to accept further hookups into the sewer system unless the plant was expanded or retrofitted in order to maintain its maximum nutrient discharge limit. For many municipalities that cannot immediately afford expansion costs, this would effectuate a development moratorium until such time as they can finance improvements. However, this only stops development. It does not create a means to raise the revenue that will eventually be required to accommodate it.

172. *Golden*, 30 N.Y.2d at 369, 285 N.E.2d at 296, 334 N.Y.S.2d at 144.

possible voluntary acceleration fee, it still does not shift any of the fiscal responsibility for municipal services away from the general tax revenues, and only prolongs the inevitable.

E. *Impact Fees*

It has been demonstrated up to this point that the provision of infrastructure for new development has become an uniquely local and burdensome responsibility. The most controversial, yet direct mechanism municipalities have enlisted for assistance in the financing of local infrastructure is the impact fee ordinance. Such ordinances direct, as a condition on permit approval, that the developer pay a specified fee to help fund off-site infrastructure.¹⁷³ The fees have been used to finance roadways, water and sewer facilities, drainage, fire and police protection, affordable housing, and other public services and facilities.¹⁷⁴ The commonly espoused theories for justifying such charges are that "[n]ew development should contribute its fair share of the costs of providing new facilities necessary to accommodate said new development"¹⁷⁵ and "existing residents should not be required to subsidize growth."¹⁷⁶ Use of the impact fee is fast becoming a viable and popular alternative for municipalities throughout the country.¹⁷⁷

Implementation of impact fee ordinances has been met by legal challenge. Three recurring obstacles¹⁷⁸ to impact fee validity which have formed the basis for many challenges include: whether there is statutory authority to create the impact fee ordinance,¹⁷⁹ whether the fee effectuates a tax rather

173. See Connors & High, *supra* note 126, at 71-72 ("Impact fees are charges levied by local government against new development in order to generate revenue for capital funding necessitated by the new development.").

174. REGIONWIDE ASSESSMENT, *supra* note 13, at 1.

175. Town of Guilderland, N.Y., Local Law No. 2, Transportation Impact Fee Law (June 2, 1987).

176. REGIONWIDE ASSESSMENT, *supra* note 13, at 6.

177. Municipalities in over thirty-nine states impose development impact assessments of one kind or another. *Issues in Focus: Impact Fees in New York — Back to the Drawing Board*, Senate Res. Serv. (N.Y. St. Senate) No. 36, at 2 (Jan. 16, 1990).

178. See Steinman, *supra* note 21.

179. See *infra* notes 183-238 and accompanying text. See also *New Jersey Builders Ass'n v. Mayor of Bernards Township*, 108 N.J. 223, 238, 528 A.2d 555, 562

than a regulation,¹⁸⁰ and whether the ordinance effects an unconstitutional taking or violates equal protection or due process rights.¹⁸¹

The creation of impact fee ordinances has received a less than favorable response by the courts in New York State.¹⁸²

(1987)(in invalidating an ordinance that allocated the cost of road improvement between the township and developers, the New Jersey Supreme Court held that the state legislature "has not delegated to municipalities the far-reaching power to depart from traditionally authorized methods of financing public facilities so as to allocate the cost of substantial public projects among new developments on the basis of their anticipated impact"). *Cf. Holmdel Builders Ass'n v. Township of Holmdel*, 121 N.J. 550, 583 A.2d 277 (1990)(the New Jersey Supreme Court ruled that mandatory development fees constituted a proper municipal exercise of the police power, however, the court held that such ordinances would be invalid absent specific statutory authority delegated by the state).

180. *Compare City of Montgomery v. Crossroads Land Co.*, 355 So. 2d 363 (Ala. 1978)(in-lieu fee is a tax and therefore must have specific statutory authorization) and *Eastern Diversified Properties, Inc. v. Montgomery County*, 319 Md. 45, 570 A.2d 850 (1990)(impact fee imposed as a condition on building permit approval was a tax which the county lacked authority to impose) with *Jenad, Inc. v. Village of Scarsdale*, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966) (in-lieu fee is not a tax but a valid regulation under the police power). *See also Contractors & Builders Ass'n v. City of Dunedin*, 329 So. 2d 314, 318 (Fla. 1976) (the criterion used by the Florida Supreme Court to distinguish a regulation from a tax was whether the amount spent by the town was greater than the amounts collected from the developments creating the need for the additional facilities); *Holmdel Builders Ass'n v. Township of Holmdel*, 121 N.J. 550, 583 A.2d 277 (1990) (development fees are a form of inclusionary zoning and thus are regulatory measures and not taxes). *See generally Steinman, supra* note 21; Keenan, *supra* note 21.

181. Standards of judicial review regarding the constitutionality of impact fees have ranged from whether the exaction is "specifically and uniquely attributable to," to "rationally related to," state interests. *Compare Pioneer Trust & Sav. Bank v. Village of Mount Prospect*, 22 Ill. 2d 375, 380, 176 N.E.2d 799, 802 (1961)(regarding fee payment requirements for educational and recreational purposes: "[I]f the burden cast upon the subdivider is 'specifically and uniquely attributable to' his activity, then the requirement is permissible; if not, it is forbidden and amounts to a confiscation of private property in contravention of the constitutional prohibitions rather than reasonable regulation under the police power.") with *Russ Bldg. Partnership v. City of San Francisco*, 199 Cal. App. 3d 1496, 1503, 246 Cal. Rptr. 21, 24 (1987)(transit fee ordinance was held to impose a "debatably rational" fee and therefore valid). *See Nollan v. California Coastal Comm'n*, 43 U.S. 825, 841 (1987)(to defeat a takings claim the condition imposed upon development must "substantially advance" state interest).

182. *See generally Albany Area Builders Ass'n v. Town of Guilderland*, 74 N.Y.2d 372, 546 N.E.2d 920, 547 N.Y.S.2d 627 (1989); *Coconato v. Town of Esopus*, 152 A.D.2d 39, 547 N.Y.S.2d 953 (1989); *Kent Dev., Inc. v. Town of North Castle*, No. 87-022804, slip op. (N.Y. Sup. Ct. Nov. 4, 1988).

However, impact fees have yet to be specifically outlawed as a potentially viable growth management tool. In reviewing challenges to local fee ordinances, the New York courts have refused to venture beyond the issue of statutory authority.¹⁸³

Under the New York State Constitution, a municipality may not enact local legislation inconsistent with either the provisions of the state constitution or with any general state law, unless such authority is expressly conferred by the legislature.¹⁸⁴ The Supreme Court of New York, Westchester County, relied on this "express authority" provision to invalidate a resolution creating an impact fee for road improvements in *Kent Development, Inc. v. Town of North Castle*.¹⁸⁵

In response to the pressures of expanding growth and development, and the inevitable detrimental impact it would have on existing roads, the Town of North Castle developed a traffic improvement district.¹⁸⁶ By resolution, the planning board created the Armonk Traffic/Roadway Improvement Impact Area.¹⁸⁷ The intended purpose of the district was to finance the planning, design, and construction of roadway improvements within a specific area.¹⁸⁸ As part of the implementation of ATRIIA, the resolution required, as a condition on site plan approval, the payment of an impact fee to help defray costs for roadway improvements in the designated area.¹⁸⁹

Reviewing municipal authority to impose fees as a condition for site plan approval, the court held to a strict interpretation of the Town Law. Section 274-a of the Town Law delegates to the town planning board the power over site plan approvals.¹⁹⁰ Nothing in this section expressly authorizes the

183. See Steinman, *supra* note 21. See generally *Guilderland*, 74 N.Y.2d 372, 546 N.E.2d 920, 547 N.Y.S.2d 627 (1989).

184. N.Y. CONST. art. IX, § 2(c).

185. No. 87-022804, slip op. (N.Y. Sup. Ct. Nov. 4, 1988).

186. *Id.* at 15.

187. *Id.*

188. *Id.* at 16.

189. *Id.* "All new office, commercial and multifamily residential development projects containing in excess of 2500 square feet of gross floor area are required to pay an 'impact fee'" *Id.* at 15-16.

190. N.Y. TOWN LAW § 274-a (McKinney 1987); accord N.Y. VILLAGE LAW § 7-725

imposition of an impact fee. The court found that in New York, courts have repeatedly refused to extend authority under the Town Law enabling legislation to impose fees beyond Section 277.¹⁹¹

Limited authority for general local lawmaking has been conferred upon New York municipalities through the Municipal Home Rule Law (MHR).¹⁹² The MHR was developed under the 1964 amendments to article IX of the New York State Constitution for the purpose of establishing effective local governance.¹⁹³ Provisions of the MHR statute are to be "liberally construed."¹⁹⁴ The general lawmaking authority of the statute is found in article 2, section 10.¹⁹⁵ This section affirmatively grants authority to towns to adopt and amend local laws pertaining to its property, affairs, and government, provided such laws are "not inconsistent with the other provisions of the constitution or . . . any general law . . ."¹⁹⁶

The MHR consistency requirement is an effective obstacle to the use of this authority in the area of development permit approvals. Town Law sections 274, 277, and 281 respec-

(McKinney Supp. 1991).

191. *Kent Dev.*, No. 87-022804, slip. op. at 19. See *supra* notes 130-131 and accompanying text. See also *Riegert Apartments Corp. v. Planning Bd.*, 57 N.Y.2d 206, 212, 441 N.E.2d 1076, 1079, 455 N.Y.S.2d 558, 561 (1982)(the court of appeals specifically held that although a town may require that before approving a subdivision plan, either land or money in lieu of land be delivered to the municipality, no such condition may be imposed on approval of a site plan).

However, a new trend is developing from the courts in regard to park land dedications, and fees in lieu thereof, which contradicts this strict interpretation. See *Kamhi v. Town of Yorktown*, 74 N.Y.2d 423, 547 N.E.2d 346, 548 N.Y.S.2d 144 (1989)(the Municipal Home Rule supersession authority may be used to create local law inconsistent with the Town Law under certain circumstances). See *infra* notes 199-218 and accompanying text. See also *Bayswater Realty & Capital Corp. v. Planning Bd.*, 76 N.Y.2d 460, 560 N.E.2d 1300, 560 N.Y.S.2d 623 (1990)(extension of section 277 fee requirements to the permitting of cluster developments under section 281 considered valid in order to further the objectives of the framers of the Town Law).

192. N.Y. MUN. HOME RULE LAW §§ 1-59 (McKinney 1969 & Supp. 1991).

193. N.Y. CONST. art. IX, § 2. See *Kamhi v. Town of Yorktown*, 74 N.Y.2d 423, 428, 547 N.E.2d 346, 348, 548 N.Y.S.2d 144, 146 (1989).

194. N.Y. MUN. HOME RULE LAW § 51 (McKinney 1969). See *Kamhi*, 74 N.Y.2d at 428, 547 N.E.2d at 348, 548 N.Y.S.2d at 146.

195. N.Y. MUN. HOME RULE LAW § 10(1)(i) (McKinney 1969 & Supp. 1991).

196. *Id.* See generally *Consolidated Edison Co. v. Town of Red Hook*, 60 N.Y.2d 99, 456 N.E.2d 487, 468 N.Y.S.2d 596 (1983).

tively regulate site plan, subdivision, and cluster development approvals.¹⁹⁷ Only section 277 provides for imposition of a fee.¹⁹⁸ As a result, any ordinance generally created under MHR section 10, imposing impact fees as a condition on permit approval, will be inconsistent with the Town Law provisions and therefore presumptively invalid.

However, MHR section 10 contains an exception to the consistency requirement. The exception is located in section 10(1)(ii)(d)(3) and is known as the "supersession authority."¹⁹⁹ This authority permits a town to supersede,²⁰⁰ in its local application, "any provision of the town law relating to the property, affairs or government of the town or to other matters in relation to which and to the extent to which it is authorized to adopt local laws by this section . . ."²⁰¹ Inconsistency is a necessary premise to use of the supersession authority.²⁰²

There are restrictions on the use of this authority. The most fundamental limitation is that of preemption.²⁰³ The supersession authority will not be permitted where the state legislature has expressly prohibited the adoption of such a law,²⁰⁴ or has evidenced its intent to occupy the field.²⁰⁵ The supersession authority is also not effective when relating to a spe-

197. N.Y. TOWN LAW §§ 274, 277, 281 (McKinney 1987 & Supp. 1991).

198. N.Y. TOWN LAW § 277 (McKinney 1987).

199. N.Y. MUN. HOME RULE LAW § 10(1)(ii)(d)(3) (McKinney 1969 & Supp. 1991). See *Kamhi v. Town of Yorktown*, 74 N.Y.2d 423, 429, 547 N.E.2d 346, 349, 548 N.Y.S.2d 144, 147 (1989).

200. Supersede is defined as "to set aside, annul, replace, make void, inefficacious or useless. . . ." BLACK'S LAW DICTIONARY 1437 (6th ed. 1990).

201. N.Y. MUN. HOME RULE LAW § 10(1)(ii)(d)(3) (McKinney 1969 & Supp. 1991). See *Kamhi*, 74 N.Y.2d at 429-30, 547 N.E.2d at 349, 548 N.Y.S.2d at 147. See also *Sherman v. Frazier*, 84 A.D.2d 401, 446 N.Y.S.2d 372 (1982).

202. *Kamhi*, 74 N.Y.2d at 430, 547 N.E.2d at 349, 548 N.Y.S.2d at 147.

203. *Albany Area Builders Ass'n v. Town of Guilderland*, 74 N.Y.2d 372, 377, 546 N.E.2d 920, 922, 547 N.Y.S.2d 627, 629 (1989) (citing *Dougal v. County of Suffolk*, 65 N.Y.2d 668, 481 N.E.2d 254, 491 N.Y.S.2d 622 (1985)).

204. *Guilderland*, 74 N.Y.2d at 377, 546 N.E.2d at 922, 547 N.Y.S.2d at 629. See also *Lansdowne Entertainment Corp. v. New York City Dep't of Consumer Affairs*, 74 N.Y.2d 761, 543 N.E.2d 725, 545 N.Y.S.2d 82 (1989).

205. *Guilderland*, 74 N.Y.2d at 377, 546 N.E.2d at 922, 547 N.Y.S.2d at 629. See also *Consolidated Edison Co. v. Town of Red Hook*, 60 N.Y.2d 99, 456 N.E.2d 487, 468 N.Y.S.2d 596 (1983); *Ames v. Smoot*, 98 A.D.2d 216, 471 N.Y.S.2d 128 (1983).

cial improvement district or improvement area,²⁰⁶ creation or alteration of areas of taxation, authorization or abolition of mandatory and permissive referenda, or town finances as provided in article 8 of the Town Law.²⁰⁷

Recently, some life was blown into the lungs of the "supersession authority," and its use in growth management, by the New York State Court of Appeals decision in *Kamhi v. Town of Yorktown*.²⁰⁸ The Town of Yorktown enacted a local law in 1982 which required payment of a recreation fee as a condition of site plan approval.²⁰⁹ In the ensuing constitutional challenge to the law, the appellate division ruled it invalid under similar rationale as that used in *Riegert Apartments* and *Kent Development*.²¹⁰

After reviewing the case, the court of appeals affirmed the appellate division's invalidation of the law.²¹¹ However, the court strayed from the strict express authority rationale and focused the majority of its opinion on the MHR "supersession authority."²¹² The court noted that outside the restrictions on the use of this authority, "the Legislature has recognized that situations may arise where laws of State-wide application are appropriately tailored by municipalities to fit their own peculiarly local needs."²¹³

The court reasoned that the purpose of the Yorktown ordinance was within this "peculiarly local needs" category.²¹⁴ Condominiums, the type of development at issue, generally do

206. This restriction invalidated the use of the MHR by the Town of North Castle to justify the creation of ATRIIA. *Kent Dev., Inc. v. Town of North Castle*, No. 87-022804, slip op. at 22 (N.Y. Sup. Ct. Nov. 4, 1988).

207. N.Y. MUN. HOME RULE LAW § 10(1)(ii)(d)(3) (McKinney 1969 & Supp. 1991).

208. 74 N.Y.2d 423, 547 N.E.2d 346, 548 N.Y.S.2d 144 (1989), *aff'g*, 141 A.D.2d 607, 529 N.Y.S.2d 528 (1988).

209. Town of Yorktown, N.Y., Local Law No. 6 (1982).

210. *Kamhi*, 141 A.D.2d at 609, 529 N.Y.S.2d at 530. See *supra* note 130 and accompanying text. The appellate division in *Kamhi* also ruled that the local law was not authorized under the MHR as inconsistent with Town Law section 274-a. 141 A.D.2d at 609, 529 N.Y.S.2d at 530.

211. 74 N.Y.2d at 426, 547 N.E.2d at 347, 548 N.Y.S.2d at 145.

212. *Id.* at 429-30, 547 N.E.2d at 349, 548 N.Y.S.2d at 147.

213. *Id.*

214. *Id.*

not require subdivision approval under sections 276 and 277.²¹⁵ As a result, condominiums are exempt from the park land and fee provisions.²¹⁶ Without the Yorktown ordinance, park land, or fees in lieu thereof, could not be collected from condominium developers. Yet, because of condominium development, the demand for park land is increased, and the burden to provide for this demand falls back on the local municipality, with the developer receiving a free ride.²¹⁷

Recognizing this situation, the court found that to permit "the Town to supersede Town Law section 274-a in its local application, so that the purpose of the statute will be promoted rather than defeated within this community, fits comfortably within section 10" of the Municipal Home Rule Law.²¹⁸ This rationale created an enticing potential for use of the supersession authority in the area of local impact fee ordinances. However, this potential was immediately curtailed by the court of appeals in its same day decision in *Albany Area Builders Association v. Town of Guilderland*.²¹⁹

Guilderland presented the classic impact fee challenge. The challenge came in response to the enactment, by the Town of Guilderland, of a transportation impact fee law (TIFL).²²⁰ The ordinance required all applicants for building permits within the town, whose projects would generate additional traffic, to pay an impact fee at the time the permit was

215. See *Gerber v. Town of Clarkstown*, 78 Misc. 2d 221, 223, 356 N.Y.S.2d 926, 928 (Sup. Ct. 1974) (a condominium is not a subdivision, and section 276, permitting town planning boards to review subdivisions, does not apply).

216. *Id.* See also 34 Op. N.Y. St. Compt. 154 (1978).

217. *Kamhi*, 74 N.Y.2d at 432, 547 N.E.2d at 350, 548 N.Y.S.2d at 148.

218. *Id.* at 432, 547 N.E.2d at 351, 548 N.Y.S.2d at 149.

After such an extensive explanation of the available Municipal Home Rule Law powers for the Town of Yorktown, the court was still compelled to sustain the appellate division's invalidation of the local law. The town board failed to enact the local law in conformance with the formalities specified in section 22(1) of the MHR, which requires the municipality to state its intention to supersede with "definiteness and explicitness." *Id.* at 434, 547 N.E.2d at 352, 548 N.Y.S.2d at 150; see N.Y. MUN. HOME RULE LAW § 22(1) (McKinney 1969).

219. 74 N.Y.2d 372, 546 N.E.2d 920, 547 N.Y.S.2d 627 (1989).

220. Town of Guilderland, N.Y., Local Law No. 2, Transportation Impact Fee Law (June 2, 1987); *Albany Area Builders Ass'n v. Town of Guilderland*, 141 A.D.2d 293, 534 N.Y.S.2d 791 (1988).

granted.²²¹ The fees, which were placed in a trust fund, were to be used exclusively for the purpose of financing capital improvements and expansion of roads and transportation facilities within the town.²²² All of the typical constitutional challenges were raised. The law was challenged for lack of statutory authority, as exceeding the local police power authority of the town by impacting surrounding communities, effectuating an illegal tax on a small number of homeowners, and regulating in an area preempted by state law.²²³ The Supreme Court, Appellate Division, held that the MHR and state constitution did not confer authority upon the town to adopt such a law, and that the law was inconsistent and preempted by general laws regulating highway funding and municipal finance.²²⁴ Municipalities across the state anxiously awaited the court of appeals' decision, anticipating a definitive ruling on the overall constitutionality of the use of impact fees in New York.²²⁵

However, the court of appeals, in its decision to affirm the appellate division and invalidate the ordinance, failed to address the constitutional issues beyond the lack of statutory authority. Following the rationale of its decision in *Kamhi*, the court found TIFL clearly "inconsistent" with the Town Law.²²⁶ This made the issue ripe for a MHR supersession claim.²²⁷ In defending its authority to enact TIFL, the town brought to issue its supersession authority under the MHR.²²⁸ Relying on *Kamhi v. Town of Yorktown*,²²⁹ the court of appeals held that the Town of Guilderland lacked supersession authority to enact TIFL because the area of roadway improvements financing was preempted by several provisions of

221. 141 A.D.2d at 295, 534 N.Y.S.2d at 792.

222. *Id.*

223. *Id.*

224. *Id.* at 229, 534 N.Y.S.2d at 795.

225. Spencer, *Town Granted Broad Power Over Development*, N.Y.L.J., Oct. 27, 1989, at 1, col. 3.

226. *Guilderland*, 74 N.Y.2d at 376, 546 N.E.2d at 921, 547 N.Y.S.2d at 628.

227. N.Y. MUN. HOME RULE LAW § 10(1)(ii)(d)(3) (McKinney 1969 & Supp. 1991).

228. 74 N.Y.2d at 377, 546 N.E.2d at 922, 547 N.Y.S.2d at 629.

229. 74 N.Y.2d 423, 547 N.E.2d 346, 548 N.Y.S.2d 144 (1989).

the Town Law and State Highway Law.²³⁰ The court noted that preemption is a fundamental restriction on the use of the MHR supersession authority.²³¹ Concluding that this area was comprehensively regulated, the court stated:

The purpose, number and specificity of these statutes make clear that the State perceived no real distinction between the particular needs of any one locality and other parts of the State with respect to the funding of roadway improvements [T]herefore . . . the State has evidenced a purpose and design to preempt the subject of roadway funding and occupy the entire field, so as to prohibit additional local regulation.²³²

The court also noted that legislative intent to preempt need not be express, but may be implied from the "nature of the subject matter being regulated and the purpose and scope of the State legislative scheme" ²³³

The fear of many impact fee proponents, that the ramifications of the *Guilderland* preemption ruling would extend to other uses of impact fee ordinances, was realized shortly thereafter by the appellate division opinion in *Coconato v. Town of Esopus*.²³⁴ The court invalidated an ordinance which required all new customers of a local water district to pay an initial hookup fee to be used solely for capital development within the district.²³⁵ Citing *Guilderland*, authority under the MHR was rejected as the court found that "[a]rticle 12 and 12-A of the Town Law establish a comprehensive scheme for financing water district improvements manifesting the legisla-

230. N.Y. TOWN LAW art. 8, §§ 100-125 (McKinney 1987)(article 8 of the Town Law establishes an elaborate and comprehensive "budget system" to regulate town finances).

N.Y. HIGH. LAW art. 10, §§ 260-292 (McKinney 1979 & Supp. 1991)(article 10 of the Highway Law establishes regulations pertaining specifically to financing highway projects within the state).

231. *Guilderland*, 74 N.Y.2d at 377, 546 N.E.2d at 922, 547 N.Y.S.2d at 629.

232. *Id.* at 378-79, 546 N.E.2d at 923, 547 N.Y.S.2d at 630.

233. *Id.* at 377, 546 N.E.2d at 922, 547 N.Y.S.2d at 629.

234. 152 A.D.2d 39, 547 N.Y.S.2d 953 (1989), *motion for leave to appeal denied*, 76 N.Y.2d 701, 557 N.E.2d 1187, 558 N.Y.S.2d 891 (1990).

235. *Id.* at 41, 547 N.Y.S.2d at 954.

ture's intent to preempt the area of financing capital improvements to town water districts."²³⁶

Similar to *Guilderland*, article 12, when combined with the article 8 budget system, creates an effective bar to the use of impact fees pertaining to improvement districts.²³⁷ As a result of the *Guilderland* decision, the reliance of towns on the MHR to authorize impact fee legislation is evidently barred by preemption. Of course, the only way around preemption is express statutory authority.

With the holdings of *Guilderland* and *Coconato* this analysis of local government authority has come full circle to the earlier premise: "Towns, cities, and villages lack the power to enact and enforce zoning or other land use regulations. . . . The exercise of that power, to the extent it is lawful, must be founded upon a legislative delegation to so proceed, and in the absence of such a grant will be held *ultra vires* and void."²³⁸

F. *Guilderland Postscript*: "[W]e have to cut back on growth."²³⁹

It is interesting to note the effect that the court of appeals decision has had on the Town of Guilderland. Robert Mitchell, president of the Albany Area Builders Association, the group which brought the suit against the town, argued against the impact fee by stating, "[T]he fee was just a ploy to avoid raising taxes in town."²⁴⁰ Town of Guilderland Supervisor, Kevin Moss, replied, "There is no question that that is what we were trying to do."²⁴¹

236. *Id.* at 42-43, 547 N.Y.S.2d at 955.

237. In *Guilderland*, article 8 was combined with the State Highway Law to preempt the field of roadway financing. 74 N.Y.2d at 377, 546 N.E.2d at 922, 547 N.Y.S.2d at 629.

238. *Golden v. Planning Bd.*, 30 N.Y.2d 359, 369-70, 285 N.E.2d 291, 296, 334 N.Y.S.2d 138, 145, *appeal dismissed*, 409 U.S. 1003 (1972).

239. Statement of Town of Guilderland Supervisor Kevin Moss in response to the defeat of the referendum to finance town highway improvements. Sanford, *Moss set to counter bypass failure with lot restrictions*, *Altamont Enterprise*, Nov. 16, 1989, at 1, col. 3.

240. Sanford, *Thumbs down on impact fees*, *Altamont Enterprise*, Nov. 2, 1989, at 1, col. 4.

241. *Id.*

The impact fee ordinance in the Town of Guilderland raised \$830,000 in fees and interest before it was invalidated by the court of appeals.²⁴² The majority of these funds were to be used for construction of an additional highway to relieve the town's traffic congestion aggravated by increased development.²⁴³ In addition to the impact fees collected, the highway improvements would have cost the town's taxpayers approximately \$7 per household.²⁴⁴ With the invalidation of the ordinance, most of the \$830,000 is to be returned to the developers.²⁴⁵ The invalidation has also placed the entire burden of paying for the improvements back on the taxpayer. This translates into an increase in the tax per household from \$7 to \$44.²⁴⁶ Opposed to increased taxes, the town's taxpayers voted down the ensuing referendum to finance the highway improvements through town borrowing, which would effect the tax increase.²⁴⁷ Town Supervisor Moss commented on the town's plight:

"As a result of the Bypass defeat, we have been put in a position where no new roads will be built because developers have refused to pay for it, and the Court of Appeals says we can't make them pay for it. The residents don't want to pay for a new road, so we have to cut back on growth"²⁴⁸

Moss indicated that the town will seek to rezone, increasing the minimum lot sizes for new homes to be built in the town.²⁴⁹ "[T]he choices are to either 'allow roads to clog with traffic or restrict growth more severely than we have in the past. . . . There is only so much a local government can

242. *Id.*

243. *Id.*

244. Sanford, *Bypass goes down hard*, Altamont Enterprise, Nov. 9, 1989, at 1, col. 3.

245. *Thumbs down on impact fees*, *supra* note 240.

246. *Bypass goes down hard*, *supra* note 244.

247. *Id.*

248. *Moss set to counter bypass failure with lot restrictions*, *supra* note 239.

249. Sanford, *Town takes another tack to pay for roads*, Altamont Enterprise, Nov. 30, 1989, at 1, col. 3.

do.' ²⁵⁰

Once again, as towns like Guilderland run out of options in trying to accommodate growth and development, they will be forced to revert to moratoria and other exclusionary zoning practices to slow or even stop development. It is likely that such practices will spur additional lawsuits by developers as local government trial-and-error zoning practices continue without guidance from the state legislature.

G. Summary Analysis

The foregoing analysis of growth management mechanisms demonstrates just how little control local governments have over managing growth and development. While it is contrary to the public health, safety, and welfare for development to proceed more rapidly than the public infrastructure, it is also contrary to popular logic to impose higher taxes upon existing users to finance the capital improvements that service new development.²⁵¹

The response of the courts and state legislature to local efforts to cope with this problem is fraught with inconsistency. The court of appeals validated the conditioning of subdivision approval upon the payment of a fee to be used for the creation and maintenance of park land.²⁵² These fees accommodate not only the subdivision, but the present and future needs of the town or broader community.²⁵³ The court held that such a fee substantially advanced state interests²⁵⁴ and was a reasonable form of planning for the general community good.²⁵⁵ The court has even gone as far as extending this au-

250. Statement of Kevin Moss, Town Supervisor. *Moss set to counter bypass failure with lot restrictions*, *supra* note 239.

251. Nicholas, *supra* note 27, at 87.

252. *Jenad, Inc. v. Village of Scarsdale*, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966). See *supra* notes 114-125 and accompanying text.

253. *Bayswater Realty & Capital Corp. v. Planning Bd.*, 76 N.Y.2d 460, 469, 560 N.E.2d 1300, 1305, 560 N.Y.S.2d 623, 628 (1990).

254. *Weingarten v. Town of Lewisboro*, 144 Misc. 2d 849, 857, 542 N.Y.S.2d 1012, 1017 (Sup. Ct. 1989), *aff'd*, 160 A.D.2d 668, 559 N.Y.S.2d 807, *appeal dismissed*, 76 N.Y.2d 934, 564 N.E.2d 670, 563 N.Y.S.2d 60 (1990).

255. *Jenad*, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966).

thority beyond section 277, to the conditioning of site plan²⁵⁶ and cluster development approvals,²⁵⁷ under the rationale that to do so would further the objectives of the framers of the Town Law.²⁵⁸

However, the same court invalidated the traffic impact fee law of the Town of Guilderland.²⁵⁹ Undoubtedly, the Town Board of Guilderland believed that collection of such fees was reasonably in the best interests of the community and the state. The court did not refute this. The key difference was the presence of legislative authority. Whereas the state legislature explicitly enables local municipalities to impose in-lieu fees for park land in Town Law section 277, no such explicit authority exists for off-site roadway improvements, or for that matter, any other type of off-site improvement.

Interestingly enough, there is also no express statutory authority to impose development moratoria. However, the court of appeals has held that ordinances such as those challenged in *Golden v. Planning Board*²⁶⁰ and *Charles v. Diamond*,²⁶¹ which effect moratoria, are valid local zoning practices authorized under the municipal police power.²⁶² The only restriction is that the ordinances reasonably promote the overall public interest.²⁶³

The court never did define what was meant by a reasonable or temporary moratorium. Yet, it seems that eighteen years, as was the potential with the Ramapo plan, did not create an unreasonable restraint on development. Ironically, such delay seems contrary to the court's non-exclusion mandate.²⁶⁴

256. *Kamhi v. Town of Yorktown*, 74 N.Y.2d 423, 547 N.E.2d 346, 548 N.Y.S.2d 144 (1989).

257. *Bayswater Realty*, 149 A.D.2d 49, 544 N.Y.S.2d 613 (1989), *aff'd as modified*, 76 N.Y.2d 460, 560 N.E.2d 1300, 560 N.Y.S.2d 623 (1990).

258. *Id.* at 56, 544 N.Y.S.2d at 618.

259. *Albany Area Builders Ass'n v. Town of Guilderland*, 74 N.Y.2d 372, 546 N.E.2d 920, 547 N.Y.S.2d 627 (1989).

260. 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972).

261. 41 N.Y.2d 318, 360 N.E.2d 1295, 392 N.Y.S.2d 594 (1977).

262. *Id.* at 324, 360 N.E.2d at 1300, 392 N.Y.S.2d at 599.

263. *Id.*

264. *See supra* notes 33-56 and accompanying text.

Further, the court in *Golden* considered valid the provision by which a developer could buy his way out of the moratorium by providing the municipality with the necessary public facilities.²⁶⁵ In light of the potential for an eighteen-year moratorium, this voluntary impact fee implies a coerciveness that resembles the mandatory impact fee which the present court of appeals finds no local authority to enact.²⁶⁶

In invalidating the Guilderland traffic impact fee law, the court of appeals ruled that the area of roadway improvement financing was preempted by comprehensive state law.²⁶⁷ Ironically, the court failed to recognize that the state legislature had just granted the home rule law request of the Town of North Castle to create a traffic improvement district.²⁶⁸ This law provides a distinct financing mechanism different from the state highway financing laws.²⁶⁹ Apparently, the legislature does not interpret this area as being completely preempted.²⁷⁰

The state legislature has also been sending inconsistent signals to local governments regarding capital infrastructure financing. Through the creation of Town Law section 190, the legislature delegated authority to the towns to create special improvement districts in order to raise needed local revenues for capital projects.²⁷¹ The law mandates that a district is to be funded only by those residents benefitted, and according to such benefit.²⁷² Section 190 does not provide authority for roadway improvement districts.²⁷³ Presumably, the rationale for such exclusion is that it is more difficult to limit the bene-

265. *Golden v. Planning Bd.*, 30 N.Y.2d at 368-69, 285 N.E.2d at 296, 334 N.Y.S.2d at 144.

266. See *supra* notes 173-238 and accompanying text.

267. *Albany Area Builders Ass'n v. Town of Guilderland*, 74 N.Y.2d 372, 377, 546 N.E.2d 920, 922, 547 N.Y.S.2d 627, 629 (1989).

268. 1989 N.Y. Laws ch. 452.

269. *Id.* See N.Y. HIGH. LAW art. 10, §§ 260-292 (McKinney 1979 & Supp. 1991).

270. See *supra* notes 160-162 and accompanying text.

271. N.Y. TOWN LAW § 190 (McKinney 1987 & Supp. 1991).

272. *Id.*

273. See *Kent Dev., Inc. v. Town of North Castle*, No. 87-022804, slip op. (N.Y. Sup. Ct. Nov. 4, 1988); 1986 Op. N.Y. St. Compt. No. 53 (Aug. 13, 1986); 1981 Op. N.Y. St. Compt. No. 353 (Oct. 26, 1981).

fits from such a district solely to those within its boundaries since roads are used by all citizens, and therefore state financing laws for highways are preemptive.²⁷⁴ However, as noted, the state legislature has recently granted individual home rule law requests for authority to create traffic improvement districts.²⁷⁵ The fees collected in these districts are to be based on the town planning boards' determination of derived benefit.²⁷⁶ Further, the traffic improvement district authorized for the Town of North Castle resulted after invalidation of a traffic impact fee law.²⁷⁷ Can this be interpreted to mean that such a home rule request is also a viable option for the Town of Guilderland? If so, will the town be able to apportion a greater amount of the benefit/cost to new development, thereby creating a similar result as that intended by the impact fee ordinance?

It is inconsistencies such as these that make an area ripe for legislative action.²⁷⁸ The court of appeals has refused to rule that a mechanism to charge new development for the cost of accommodating it with improved capital infrastructure is unconstitutional. Rather, it has repeatedly held that local municipalities do not have the inherent authority to impose such mechanisms absent a delegation from the state legislature. In holding back from addressing this issue, the court seems to be prodding the legislature to act.

The next section analyzes new legislation that could resolve some of the present inconsistencies plaguing the area of growth management.

VII. State Legislation

"Zoning . . . is essentially a legislative act. . . . [I]t is

274. See N.Y. HIGH. LAW §§ 260-292 (McKinney 1979 & Supp. 1991).

275. See *supra* notes 151-162 and accompanying text.

276. See 1989 N.Y. Laws ch. 452, § 2.

277. *Kent Dev.*, No. 87-022804, slip op. (N.Y. Sup. Ct. Nov. 4, 1988).

278. See *Moriarity v. Planning Bd.*, 119 A.D.2d 188, 192, 506 N.Y.S.2d 184, 187 (1986) (the appellate division noted that it was inconsistent interpretation of planning board authority regarding site plan approvals that led the legislature to create Town Law section 274-a).

quite anomalous that a court should be required to perform the tasks of a regional planner. To that end, we look to the Legislature to make appropriate changes

... '279

As noted at the outset of this Comment, the state legislature has been content to leave matters of zoning and planning in the hands of local governments by delegating this authority with a broad brush. The resulting mass of litigation, as municipal officials test the limits of this authority to address the changing scene of community planning, has placed the state judiciary in the role of law and policy maker. As noted in *Berenson*, this is a position the court is not comfortable with.²⁸⁰

The issues of growth management affect towns and villages statewide. Though zoning practices are applied locally, they often have a substantial impact beyond the boundaries of a single municipality.²⁸¹ Guidance from the state legislature, in the form of new acts or amendments to current statutes, could eliminate much of the trial-and-error planning and resulting litigation. In these times of fiscal paucity, the time and resources of local governments could be better spent in the communities rather than at the courthouse.

The final section of this Comment recognizes three areas where legislative guidance could resolve some of the litigious inconsistencies over authority for current local zoning practices. The first is the park land and in-lieu fee provision of Town Law section 277.²⁸² The second is transportation development districts, and the third area is impact fees.

The purpose of Town Law sections 276 and 277 is to provide for the future growth and development of the town, affording adequate facilities for the health and welfare of its residents.²⁸³ In line with this purpose, the statute requires the

279. *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 111, 341 N.E.2d 236, 243, 378 N.Y.S.2d 672, 682 (1975).

280. *Id.*

281. *Id.* at 110, 341 N.E.2d at 242, 378 N.Y.S.2d at 681.

282. N.Y. TOWN LAW § 277 (McKinney 1987); accord N.Y. VILLAGE LAW § 7-730 (McKinney 1973).

283. N.Y. TOWN LAW §§ 276, 277 (McKinney 1987).

provision of park land or in-lieu fees as a precondition to development approval.²⁸⁴ However, sections 276 and 277 pertain only to the approval of subdivision plats. Certain types of development, namely garden apartments and condominiums, do not require subdivision plat approval.²⁸⁵ Similarly, cluster subdivision plat approval is governed by section 280-a which does not contain the park land or fee requirement.²⁸⁶ Much litigation has arisen challenging the extension of this requirement outside of section 277. Recently, the court of appeals has ruled that the park land or in-lieu fee provision is meant to be applied to all new development regardless of whether approval under section 276 and 277 is required.²⁸⁷ However, these decisions come on the heels of prior decisions which refused to interpret these provisions so broadly.²⁸⁸

By clarifying the language of section 277, to assure that all new development, whether it be seeking subdivision,²⁸⁹ cluster subdivision,²⁹⁰ or site plan approval,²⁹¹ contributes its fair share to meet the park and recreational needs of the town, the legislature will close up present loopholes and confirm and preserve the recent court of appeals rulings. At the same time that the scope of section 277 is being expanded, a provision should be included to prohibit a municipality from exacting a double fee, such as could potentially occur if an in-lieu fee is collected from the original subdivider of the plat and later from an individual home builder seeking site plan approval.

Clarification regarding the computation of in-lieu fees will also be beneficial, not only for the municipalities, but for the developers as well.²⁹² The legislature should indicate whether

284. N.Y. TOWN LAW § 277 (McKinney 1987 & Supp. 1991).

285. See *supra* notes 215-216 and accompanying text.

286. N.Y. TOWN LAW § 280-a (McKinney 1987).

287. See *supra* note 131 and accompanying text.

288. See *supra* note 130.

289. N.Y. TOWN LAW § 276 (McKinney 1987).

290. N.Y. TOWN LAW § 280-a (McKinney 1987).

291. N.Y. TOWN LAW § 274-a (McKinney 1987).

292. See REGIONWIDE ASSESSMENT, *supra* note 13, at 47-49. A survey of developers indicated that payment based on known standards and defined in an ordinance is a preferred approach to private sector funding of public facilities. *Id.* at 47.

these fees are to be set charges per lot or unit and applied equally to all development approvals as necessary dedications, or rather, based on a formula according to current municipal need or mitigation of anticipated impact of the new development.²⁹³ Such uniform guidance, legislated by the state and incorporated into local zoning ordinances, will provide adequate notice to the development community and potentially decrease equal protection and takings claims.²⁹⁴

Another area where legislative action will be helpful, and in fact seems imminent, is transportation development districts. Town Law section 190, which authorizes towns to create special improvement districts, excludes major transportation improvements from the list of authorized projects for which districts may be created and revenue raised.²⁹⁵ However, the state legislature has granted special home rule requests for the creation of transportation districts in areas of special need.²⁹⁶ As more and more areas of the state experience rapid growth, with resulting traffic congestion, it seems inefficient to require them all to petition the legislature individually. Legislative options include an amendment to Town Law section 190, adding transportation development districts to the list of other authorized districts, or enactment of a sep-

293. See *Bayswater Realty & Capital Corp. v. Planning Bd.*, 76 N.Y.2d 460, 560 N.E.2d 1300, 560 N.Y.S.2d 623 (1990). The court of appeals indicated that planning boards may exact park land or in-lieu fees upon a pre-determination of present and future need for park and recreational facilities in the town based on projected population growth, to which the particular development will contribute. *Id.* at 470, 560 N.E.2d at 1306, 560 N.Y.S.2d at 628. However, in the companion case to *Bayswater*, *Weingarten v. Town of Lewisboro*, 144 Misc. 2d 849, 542 N.Y.S.2d 1012 (Sup. Ct. 1989), *aff'd*, 160 A.D.2d 668, 559 N.Y.S.2d 807, *appeal dismissed*, 76 N.Y.2d 934, 564 N.E.2d 670, 563 N.Y.S.2d 60 (1990), the court of appeals refused to review the supreme court's decision, which validated a set fee per lot, pending the outcome of the *Bayswater* remand. 76 N.Y.2d 934, 564 N.E.2d 670, 563 N.Y.S.2d 60 (1990).

294. See generally *Bayswater Realty*, 76 N.Y.2d 460, 560 N.E.2d 1300, 560 N.Y.S.2d 623 (1990); *Kamhi v. Town of Yorktown*, 74 N.Y.2d 423, 547 N.E.2d 346, 548 N.Y.S.2d 144 (1989); *Weingarten*, 144 Misc. 2d 849, 542 N.Y.S.2d 1012 (Sup. Ct. 1989), *aff'd*, 160 A.D.2d 668, 559 N.Y.S.2d 807, *appealed dismissed*, 76 N.Y.2d 934, 564 N.E.2d 670, 563 N.Y.S.2d 60 (1990) (in all three actions, the plaintiff-developer raised equal protection and takings claims with regard to in-lieu fees under Town Law section 277).

295. See *supra* note 142.

296. See *supra* notes 148-162 and accompanying text.

arate transportation development district enabling act.

A bill amending the New York Town Law to authorize towns to establish transportation development districts was introduced in the State Senate in May of 1989.²⁹⁷ Sections 10 through 18 of the proposed act would have amended Town Law article 12.²⁹⁸ The amendments provided authority for the establishment of transportation development districts in the same manner as other authorized improvement districts.²⁹⁹ The expense of establishing a transportation district was to be assessed according to Town Law section 202(3), as a charge to all lots within the district, proportionate to derived benefit.³⁰⁰ The bill never gained support in the legislature.

Potential shortcomings of an amendment such as this include the failure to enumerate the types of improvements that a district could be formed to finance; the failure to give guidance on how boundaries for such districts were to be determined; and the failure to give guidance on how to determine the proportionate benefit derived, especially since roadways are used by more than just district residents.

The neighboring states of Pennsylvania and New Jersey have both adopted individual transportation development district statutes.³⁰¹ While both are general enabling acts, they provide specific guidance to be carried out by the authorized agency. The New Jersey act designates county governments as lead agencies, while providing for participation by state, local, and private representatives.³⁰² The Pennsylvania act delegates authority to municipalities, while providing for necessary coordination with state and regional agencies.³⁰³

The New Jersey act sets forth criteria to be used for determining district boundaries, and requires the districts to

297. S. 5150, 1989 N.Y. St. Leg., Reg. Sess. §§ 1-18 (1989).

298. N.Y. TOWN LAW §§ 190-202 (McKinney 1987).

299. S. 5150, 1989 N.Y. St. Leg., Reg. Sess. § 12 (1989).

300. *Id.* § 17. See N.Y. TOWN LAW § 202(3) (McKinney 1987 & Supp. 1991).

301. N.J. Transportation Development Act of 1989, N.J. STAT. ANN. §§ 27:1C-1 to -18 (West Supp. 1990); Transportation Partnership Act, PA. CONS. STAT. ANN. tit. 53, §§ 1621 to -26 (Purdon Supp. 1990).

302. N.J. STAT. ANN. §§ 27:1C-4 to -5 (West Supp. 1990).

303. PA. CONS. STAT. ANN. tit. 53, §§ 1621 to -26 (Purdon Supp. 1990).

conform to the county master plan.³⁰⁴ Once a transportation development district is designated, the county must establish another plan to include a listing of the necessary improvements, and a financial program that establishes how each improvement is to be funded, including costs and funding sources.³⁰⁵ This plan must also include a formula for determining the amount of the fee to be assessed in the district.³⁰⁶ Recommended criteria include numbers of trips generated, square footage, number of employees, or number of parking spaces.³⁰⁷ The fees collected are deposited in a separate trust fund and can only be allocated for projects in the approved plan.³⁰⁸ The plan is subject to public hearing before being sent for state approval.³⁰⁹

The Pennsylvania act delegates exclusive authority for the creation and operation of the transportation development district to the governing body of the state's municipalities.³¹⁰ The act lists the types of facility projects and services that may be undertaken and provided within the district.³¹¹ A series of financial mechanisms for district projects is also enumerated.³¹² Included is an assessment on each benefitted property within the district, using a formula adopted by the municipality based upon actual or projected usage of the transportation facilities or services to be financed.³¹³ The act also calls for a comprehensive study to determine the program of projects to be so financed,³¹⁴ and the act provides for re-funds upon cancellation of projects or services.³¹⁵

The comprehensive nature of these two acts makes them ideal models for alternatives to the ill-fated amendment to

304. N.J. STAT. ANN. § 27:1C-8 (West Supp. 1990).

305. N.J. STAT. ANN. § 27:1C-5 (West Supp. 1990).

306. *Id.*

307. N.J. STAT. ANN. § 27:1C-8 (West Supp. 1990).

308. N.J. STAT. ANN. § 27:1C-7 (West Supp. 1990).

309. N.J. STAT. ANN. § 27:1C-5 (West Supp. 1990).

310. PA. CONS. STAT. ANN. tit. 53, § 1622 (Purdon Supp. 1990).

311. *Id.*

312. PA. CONS. STAT. ANN. tit. 53, § 1623 (Purdon Supp. 1990).

313. *Id.*

314. PA. CONS. STAT. ANN. tit. 53, § 1624 (Purdon Supp. 1990).

315. PA. CONS. STAT. ANN. tit. 53, § 1625 (Purdon Supp. 1990).

Town Law section 190.³¹⁶ However, if serious consideration is to be given to the transportation district mechanism, it should be noted that the program in Pennsylvania has not been as successful as hoped for.³¹⁷ It seems that municipal officials are wary of creating new ordinances which will be perceived as a means to increase taxes, since the program requires assessment of existing residential properties in the same manner as new development.³¹⁸ Such a mechanism will probably run into the same resistance in New York.

The final area where the state legislature can clarify local government zoning authority is impact fee enabling legislation. Legislatures in over nineteen states have now explicitly delegated authority to local governments to exact some of the costs of accommodating growth and development from developers and new residents.³¹⁹ These legislative provisions range from general language permitting local governing bodies to charge new development a proportionate share of the costs of new or expanded services,³²⁰ to detailed, comprehensive im-

316. See *supra* notes 297-300 and accompanying text.

317. TRANSPORTATION PARTNERSHIPS, *supra* note 146, at 9.

318. *Id.*

319. This figure was acquired from a review of state zoning laws. The state statutes listed below are those that contain specific provisions for charging developers fees as a condition on building approval. (Not included are states where authority to impose fees has been implied from state constitutions and general police power delegations. See *supra* note 15.) ARIZ. REV. STAT. ANN. §§ 11-1101 to -1109 (Supp. 1990); ARIZ. REV. STAT. ANN. § 9-463.05 (1990); CAL. GOV'T CODE §§ 66000-66007 (West Supp. 1991); CAL. GOV'T CODE § 65971 (West 1989); COLO. REV. STAT. §§ 29-1-801 to -804 (Supp. 1990); FLA. STAT. ANN. § 163.3202 (West 1990); GA. CODE ANN. §§ 36-71-1 to -13 (Supp. 1990); ILL. STAT. ANN. ch. 121, paras. 5-901 to -919 (Smith-Hurd Supp. 1990); ME. REV. STAT. ANN. tit. 31, § 4354 (Supp. 1990); MD. ANN. CODE art. 23A, § 2(6)(33)(ii) (1990); MD. ENV'T CODE ANN. § 9-722(a)(1) (1987); MINN. STAT. ANN. § 462.358 (West Supp. 1991); NEV. REV. STAT. §§ 278B.010 to .320 (Supp. 1989); N.J. STAT. ANN. § 40:55D-42 (West Supp. 1990); OR. REV. STAT. §§ 223.297 to .314 (1989); PA. CONS. STAT. ANN. tit 53, §§ 1501-A to 1507-A (Purdon Supp. 1991); S.D. CODIFIED LAWS ANN. § 46A-10B-21 (Supp. 1990); TEX. LOCAL GOV'T CODE §§ 395.001 to .080 (Vernon Supp. 1991); VT. STAT. ANN. tit. 24, §§ 5200-5206 (Supp. 1990); VA. CODE ANN. § 15.1-466 (Supp. 1990); VA. CODE ANN. §§ 15.1-498.1 to .10 (Supp. 1990); WASH. REV. CODE ANN. §§ 39.92.010 to .901 (Supp. 1991); W. VA. CODE ANN. §§ 7-20-1 to -10 (Supp. 1990).

320. ARIZ. REV. STAT. ANN. § 9-463.05 (1990)(a municipality may assess development fees to offset costs to the municipality associated with providing necessary services to development); FLA. STAT. ANN. § 163.3202 (West 1990)(encourages the use of

pact fee enabling laws;³²¹ from laws authorizing collection of fees for type-specific projects or improvements,³²² to encompassing lists of public improvements that may be funded by impact fees.³²³

Three of the five states bordering New York — New Jersey,³²⁴ Vermont,³²⁵ and Pennsylvania³²⁶ — have all enacted

innovative land development regulations, including impact fees); MD. ANN. CODE art. 23A, § 2(b)(33)(ii) (1990)(empowers municipal corporations "to establish and collect reasonable fees and charges . . . [a]ssociated with the exercise of any governmental or proprietary function authorized by law to be exercised by a municipal corporation"); N.J. STAT. ANN. § 40:55D-42 (West Supp. 1990)(governing body may require developer to pay his pro-rata share of the cost of providing reasonable and necessary improvements); VA. CODE ANN. § 15.1-466 (Supp. 1990)(pro-rata share provision).

321. ARIZ. REV. STAT. §§ 11-1101 to -1109 (Supp. 1990)(effective Sept. 1990); CAL. GOV'T CODE §§ 66000-66007 (West Supp. 1991)(effective Jan. 1, 1989 and amended 1990); GA. CODE ANN. §§ 36-71-1 to -13 (Supp. 1990)(effective Apr. 4, 1990); ILL. ANN. STAT. ch. 121, paras. 5-901 to -919 (Smith-Hurd Supp. 1990)(effective July 26, 1989); ME. REV. STAT. ANN. tit. 31, § 4354 (Supp. 1990)(effective July 11, 1989); NEV. REV. STAT. §§ 278B.010 to .320 (Supp. 1989)(added 1989); OR. REV. STAT. §§ 223.297 to .314 (1989)(added 1989); PA. CONS. STAT. ANN. tit. 53, §§ 1501-A to 1507-A (Purdon Supp. 1991)(approved Dec. 19, 1990); TEX. LOCAL GOV'T CODE §§ 395.001 to .080 (Vernon Supp. 1991)(effective Aug. 28, 1989); VT. STAT. ANN. tit. 24, §§ 5200-5206 (Supp. 1990)(effective July 1990); VA. CODE ANN. §§ 15.1-498.1 to .10 (Supp. 1990)(effective July 1, 1990); WASH. REV. CODE ANN. §§ 82.02.050 to -.090 (Supp. 1991)(effective 1989); W. VA. CODE ANN. §§ 7-20-1 to -10 (Supp. 1990)(effective July 1990).

322. CAL. GOV'T CODE § 65971 (West 1989)(permits impact fees to finance new school facilities); ILL. ANN. STAT. ch. 121, paras. 5-901 to -919 (Smith-Hurd Supp. 1990)(road improvement impact fees); MD. ENV'T CODE ANN. § 9-722(a)(1) (1987)(sewer and water impact fees); PA. CONS. STAT. ANN. tit. 53, §§ 1501-A to 1507-A (Purdon Supp. 1991)(transportation capital improvements impact fee); S.D. CODIFIED LAWS ANN. § 46A-10B-21 (Supp. 1990)(stormwater basin development fee); VA. CODE ANN. §§ 15.1-498.1 to .10 (Supp. 1990)(road impact fee); WASH. REV. CODE ANN. §§ 39.92.010 to .901 (Supp. 1991)(transportation impact fee).

323. ARIZ. REV. STAT. § 11-1101(14) (Supp. 1990); CAL. GOV'T CODE § 66002 (West Supp. 1991); GA. CODE ANN. § 36-71-1(16) (Supp. 1990); ME. REV. STAT. ANN. tit. 31, § 4354(1)(A) (Supp. 1990); NEV. REV. STAT. § 278B.020 (Supp. 1989); N.J. STAT. ANN. § 40:55D-42 (West Supp. 1990); OR. REV. STAT. § 223.299 (1989); TEX. LOCAL GOV'T CODE § 395.001 (Vernon Supp. 1991); VA. CODE ANN. § 15.1-466 (Supp. 1990); WASH. REV. CODE § 82.02.090 (Supp. 1991); W. VA. CODE ANN. § 7-20-3(a) (Supp. 1990).

324. N.J. STAT. ANN. § 40:55D-42 (West Supp. 1990).

The New Jersey enabling statute is the most general delegation of the three. It provides:

The governing body may by ordinance adopt regulations requiring a developer, as a condition for approval of a subdivision or site plan, to pay his pro-rata share of the cost of providing only reasonable and necessary street improvements and water, sewerage and drainage facilities, and easements therefor, located outside the proprietary limits of the subdivision or development

impact fee enabling legislation. Yet, the state of New York, which has long prided itself as a leader in land use zoning since the days before *Euclid v. Ambler*,³²⁷ has failed to successfully put forth its own enabling authority to permit local governments to shift some of the burden of accommodating increased growth.³²⁸

but necessitated or required by construction or improvements with such subdivision or development.

Id.

Other than this general grant of authority, the only guideline mandated by the statute is that the pro-rata share be established by fair and reasonable standards. *Id.* Such a statute leaves much to the discretion of the local governments and has led to continued litigation over its proper application. See *Holmdel Builders Ass'n v. Township of Holmdel*, 121 N.J. 550, 583 A.2d 277 (1990); *New Jersey Builders Ass'n v. Mayor of Bernards Township*, 108 N.J. 223, 528 A.2d 555 (1987).

325. VT. STAT. ANN. tit. 24, §§ 5200-5206 (Supp. 1990).

The Vermont enabling statute is more comprehensive and detailed than the New Jersey statute. The statute grants authority to municipalities to create an ordinance to "require the beneficiaries of new development to pay their proportionate share of the cost of municipal and school capital projects which benefit them and to pay for or mitigate the negative effects of construction." *Id.* § 5201(2)(a). The statute requires that an ordinance be based on a comprehensive capital budget and program, listing proposed projects, their costs, sources of funding, and scheduling. *Id.* § 5203(a)(1). The statute also requires that the ordinance contain a reasonable formula for assessing the impact fee. *Id.* § 5203(a)(2). The fee amount is restricted to be "equal to or less than the portion of the capital cost of a capital project which will benefit or is attributable to the development" *Id.* § 5203(b). The statute also contains provisions for collection, accounting, refunds, and exemptions. *Id.* §§ 5203-5205.

326. PA. CONS. STAT. ANN. tit. 53, §§ 1501-A to 1507-A (Purdon Supp. 1991).

The Pennsylvania statute is the most recent as well as most comprehensive of the three. The statute authorizes municipal governments, by way of local ordinance, to exact off-site transportation capital improvement fees from new development. *Id.* § 1503-A. Like the Vermont statute, Pennsylvania requisites its impact fee ordinances on comprehensive transportation capital improvement plans. *Id.* § 1504-A. The statute goes into extreme detail describing a series of required reports to be included in the plan in order to determine the need for present and prospective capital improvements. *Id.* The statute outlines a formula for establishing the impact fees based on the costs of capital improvements attributable to new development. *Id.* § 1505-A. The statute further mandates a series of administrative provisions pertaining to fee collection, including time for collection, refunds, time limits on spending, creation of special escrow accounts, public notice, and appeal procedures. *Id.* §§ 1505-A, 1506-A.

327. 272 U.S. 365 (1926).

The first "comprehensive zoning" ordinance was adopted by the City of New York in 1916. *New York City, N.Y., Building Zone Ordinance* (1916). See R. ANDERSON, *supra* note 2, at § 1.14. See also *Lincoln Trust Co. v. Williams Bldg. Corp.*, 229 N.Y. 313, 128 N.E. 209 (1920) (zoning law proper exercise of police power).

328. A bill was introduced in both the Senate and Assembly of the New York

The current trend among states facing or anticipating increased development pressures is the comprehensive impact fee enabling statute. Since 1989, thirteen states have enacted some form of comprehensive impact fee enabling statute for exaction of impact fees.³²⁹

The creation of comprehensive impact fee enabling statutes is intended to serve a two-fold purpose. First, an effective enabling statute eliminates the *ultra vires*, or lack of local government authority issue.³³⁰ Second, such a statute offers the state the opportunity to direct local governments toward the development of a constitutionally sound impact fee ordinance.³³¹

To eliminate *ultra vires* challenges to local impact fee ordinances, the enabling statute should include certain provisions describing the extent of authority delegated. The statute should clearly identify the following: (a) the governing bodies that may impose impact fees;³³² (b) those from whom fees

Legislature to amend Town Law section 277 in relation to the approval of plats. S. 6018, A. 8405, 1989 N.Y. St. Leg., Reg. Sess. (1989). The amendment provided:

As a further condition of approval, in addition to that which is otherwise permitted or allowed by statute, local law or resolution, the planning board may require provisions for further public improvements, or payment therefor, depending on the area, size and impact of the proposed new plat, development or subdivision. The payment shall be to the town of a sum to be determined by the town board, which sum shall constitute a trust fund to be used by the town as exclusively for the purposes for which said sum is required. Improvements to facilities which may be required under this section are, but shall not be limited to, water facilities, roads, libraries, sewage treatment plants, firehouses or apparatus, schools, police and any other public needs generated by the proposed development.

Id.

The bill failed to gain approval most likely because it left too much deference with the local town boards, much like the New Jersey statute.

329. See *supra* note 321.

330. See Morgan, Strauss, & Leitner, *State Impact Fee Legislation*, LAND USE L. & ZONING DIG., Jan. 1988, at 3, 4.

331. *Id.*

332. ARIZ. REV. STAT. ANN. § 11-1102(A) (Supp. 1990)(counties); CAL. GOV'T CODE § 66000(c) (West Supp. 1991)(local agencies which can impose fees include a county, city, whether general law or chartered, city and county, school district, special district, authority, agency, any other municipal public corporation or district, or other political subdivision of the state); ILL. STAT. ANN. ch. 121, para. 5-903 (Smith-Hurd Supp. 1990)(counties with a population of over 400,000 and all home rule

may be exacted;³³³ (c) the types of facilities, improvements, and services for which fees may be collected and expended for,³³⁴ as well as those for which fees may not be collected and expended for;³³⁵ and (d) when the fees may be exacted.³³⁶ The statute should mandate that all impact fees be implemented according to a local ordinance created pursuant to the state enabling act.³³⁷ The statute should also establish a comprehensive procedure for enacting the local impact fee ordinance, including provisions for public input.³³⁸

An effective enabling statute should address and remedy

municipalities).

333. GA. CODE ANN. § 36-71-2(5) (Supp. 1990)(fees imposed on all development, which is defined as "any construction or expansion of a building, structure, or use, any change in use of a building or structure, or any change in the use of land, any of which creates additional demand and need for public facilities"); ILL. STAT. ANN. ch. 121, para. 5-903 (Smith-Hurd Supp. 1990)(fees imposed on new development, which is defined as "any residential, commercial, industrial or other project which is being newly constructed, reconstructed, redeveloped, structurally altered, relocated, or enlarged, and which generates additional traffic within the service area or areas of the unit of local government").

334. TEX. LOCAL GOV'T CODE § 395.012 (Vernon Supp. 1991)("Items Payable by Fee"); ME. REV. STAT. ANN. tit. 31, § 4354(A) (Supp. 1990)("Infrastructure facilities include, but are not limited to: 1)waste water collection and treatment facilities; 2) municipal water facilities; 3) solid waste facilities; 4)fire protection facilities; 5)roads and traffic control devices; and 6)parks and other open space or recreational areas.").

335. TEX. LOCAL GOV'T CODE § 395.013 (Vernon Supp. 1991)("Items Not Payable by Fee"); NEV. REV. STAT. § 278B.280 (Supp. 1989)("Prohibited Uses of Impact Fees"); OR. REV. STAT. § 223.299(1)(b) (1989)(" 'Capital improvements' [for which fees are collected] does not include costs of the operation or routine maintenance of capital improvements.").

336. TEX. LOCAL GOV'T CODE § 395.016 (Vernon Supp. 1991)("Time for Assessment and Collection of Fee"); VA. CODE ANN. § 15.1-498.6 (1990)("When Impact Fees Assessed and Imposed").

337. ARIZ. REV. STAT. ANN. § 11-1102(A) (Supp. 1990)("A county may not assess, impose, levy or collect a development fee for a public facility unless it has adopted a development fee ordinance pursuant to the development requirements of this chapter."); TEX. LOCAL GOV'T CODE § 395.011(a) (Vernon Supp. 1991)("Authorization of Fee. Unless otherwise specifically authorized by state law or this chapter, a governmental entity or political subdivision may not enact or impose an impact fee.").

338. ARIZ. REV. STAT. ANN. § 11-1107 (Supp. 1990)("Development Fee; Hearing; Notice; Procedures"); ILL. STAT. ANN. ch. 121, para. 5-905(b) (Smith-Hurd Supp. 1990)("Procedure for the Imposition of Impact Fees. A unit of local government intending to impose an impact fee shall adopt an ordinance or resolution establishing a public hearing date to consider land use assumptions that will be used to develop the comprehensive road improvement plan."); TEX. LOCAL GOV'T CODE §§ 395.041 to .058 (Vernon Supp. 1991)("Procedures for Adoption of Impact Fee").

the regulatory fee/unauthorized tax controversy.³³⁹ The statute should include provisions to clearly distinguish the fees from the general tax rolls. To do so, the statute should require that the local ordinance specifically limit and identify the projects that fees are being collected for.³⁴⁰ The statute should mandate that the maximum fee exacted be no higher than a proportionate share of the total cost of the necessary improvement.³⁴¹ A provision should be included to refund any excess fees above the cost of the improvement.³⁴² The statute should require that the local ordinance set a time limit on spending the fees, with another provision for refund of unused amounts after the period expires.³⁴³ The enabling statute should also require that the funds be segregated into individual escrow accounts earmarked for specific projects.³⁴⁴ This will prevent commingling of the fees with the general treasury fund and further support classification of the charges as regulatory fees rather than unauthorized taxes.³⁴⁵

The comprehensive enabling statute also offers states the opportunity to orchestrate constitutionally sound local impact fee ordinances. In considering the constitutional challenges to

339. See *Jenad, Inc. v. Village of Scarsdale*, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966).

340. ARIZ. REV. STAT. ANN. § 11-1102(B) (Supp. 1990) ("Development fees may be imposed only for one or more public facilities which are identified in a benefit area plan."); OR. REV. STAT. § 223.299 (1)(b) (1989) (" 'Capital improvements' [for which fees are collected] does not include costs of the operation or routine maintenance of capital improvements.").

341. VT. STAT. ANN. tit. 24, § 5202(b) (Supp. 1990).

342. TEX. LOCAL GOV'T CODE § 395.025 (Vernon Supp. 1991) ("If the impact fee calculated based on actual cost is less than the impact fee paid, the political subdivision shall refund the difference if the difference exceeds the impact fee by more than 10 percent.").

343. VT. STAT. ANN. tit. 24, § 5203(e) (Supp. 1990) ("The municipality must spend the fee on the capital project, for which the fee was intended, within six years of when the fee was paid. If it fails to do this, the owner of the property . . . may apply for . . . a refund of his proportionate share of the fee . . .").

344. ARIZ. REV. STAT. ANN. § 11-1105(3)(a) (Supp. 1990) ("[D]evelopment fees shall be accounted for in a fund that clearly identifies the type of public facility for which the fee was imposed, and development fees shall be invested with all interest accruing to the fund."); TEX. LOCAL GOV'T CODE § 395.024 (Vernon Supp. 1991) ("Accounting for Fees and Interest").

345. See Keenan, *supra* note 21, at 338-39.

impact fee ordinances, *i.e.*, takings,³⁴⁶ due process,³⁴⁷ and equal protection,³⁴⁸ the framers of the state enabling statute should be cognizant of two relationships. The first is the relationship between the impact fee condition and the public purpose *for which* it is exacted.³⁴⁹ The second is the relationship between the impact fee and the development *from which* it is exacted.³⁵⁰

The United States Supreme Court, in *Nollan v. California Coastal Commission*,³⁵¹ addressed the first relationship when it considered a regulatory takings challenge to a local zoning ordinance. The Court held that the ordinance, which conditioned a building permit on the dedication of a public easement along a beach, did not substantially advance its claimed public purpose, and was therefore an unconstitutional taking.³⁵² This standard has been interpreted to apply to conditional fee ordinances, requiring that such fees substantially advance an explicit state interest.³⁵³

To obviate such a challenge, or to provide a good defense in the event one should still arise, the enabling statute should clearly state the public purpose for which the fee is to be collected.³⁵⁴ To support this purpose, the statute should also require that the local ordinance specifically define the projects that the fees will be expended for. This can be achieved by

346. N.Y. CONST. art. I, § 7(a).

347. N.Y. CONST. art. I, § 6.

348. N.Y. CONST. art. I, § 11. *See supra* notes 178-181 and accompanying text; *see also* Keenan, *supra* note 21, at 336.

349. Morgan, Strauss, & Leitner, *supra* note 330, at 5.

350. *Id.*

351. 483 U.S. 825 (1987).

352. *Id.* at 842.

353. *See* Keenan, *supra* note 21, at 338, 339. *Cf.* Morgan, Strauss, & Leitner, *supra* note 330, at 5. *See also* Weingarten v. Town of Lewisboro, 144 Misc. 2d 849, 542 N.Y.S.2d 1012 (Sup. Ct. 1989), *aff'd*, 160 A.D.2d 668, 559 N.Y.S.2d 807, *appeal dismissed*, 76 N.Y.2d 934, 564 N.E.2d 670, 563 N.Y.S.2d 60 (1990)(applying the *Nollan* standard to exaction of in-lieu fees).

354. GA. CODE ANN. § 36-71-1(b)(2) (Supp. 1990)("It is the intent of this chapter to [p]romote orderly growth and development by establishing uniform standards by which municipalities and counties may require that new growth and development pay a proportionate share of the cost of new public facilities needed to serve new growth and development.").

requiring that the local ordinance be based on a detailed comprehensive public improvement plan.³⁵⁵ This plan should report on the present and prospective need for improved public facilities, the proportion of this need attributable to new development, the costs of the improvements, all potential funding sources, and a time schedule for implementation.³⁵⁶ The more detailed this plan is, the stronger the relationship between the fee and its public purpose, and therefore the stronger the justification for imposition of fees to help fund it.

The second relationship that should be addressed in framing a constitutionally valid impact fee enabling act is the relationship between the fee and the development that it is exacted from. Common law has generated three standards for reviewing this relationship in fee ordinances. They are the "specifically and uniquely attributable test,"³⁵⁷ the "rational nexus standard,"³⁵⁸ and the "reasonable relationship test."³⁵⁹ In designing an enabling statute to address constitutional challenge, the legislature should incorporate one of these standards.³⁶⁰ Guidance for the standard that would be applied in New York may be interpreted from case law dealing with in-

355. PA. CONS. STAT. ANN. tit. 53, § 1504-A (Purdon Supp. 1991)("Transportation Capital Improvements Plan").

356. *Id.* See also TEX. LOCAL GOV'T CODE § 395.014 (Vernon Supp. 1991)("Capital Improvements Plan").

357. *Pioneer Trust & Sav. Bank v. Village of Mount Prospect*, 22 Ill. 2d 375, 380, 176 N.E.2d 799, 802 (1961)("If the burden cast upon the subdivider is 'specifically and uniquely attributable to' his activity, then the requirement is permissible . . .").

358. See *Home Builders & Contractors Ass'n v. Palm Beach County*, 446 So. 2d 140, 143-44 (Fla. App. 1983)("[B]enefit accruing to the community generally does not adversely affect the validity of a development regulation ordinance as long as the fee does not exceed the cost of the improvements required by the new development and the improvements adequately benefit the development which is the source of the fee.")

359. *Russ Bldg. Partnership v. City of San Francisco*, 199 Cal. App. 3d 1496, 1503, 246 Cal. Rptr. 21, 24 (1987)(transit impact fee ordinance held to impose a "debatably rational" fee and therefore valid).

360. See ILL. ANN. STAT. ch. 121, para. 5-904 (Smith-Hurd Supp. 1990)("Authorization for the Imposition of an Impact Fee. . . . An impact fee payable by a developer shall not exceed a proportionate share of costs incurred by a unit of local government which are specifically and uniquely attributable to the new development paying the fee . . .").

lieu fees.³⁶¹

In *Weingarten v. Town of Lewisboro*,³⁶² the Supreme Court of Westchester County applied the rational nexus or relationship standard. Addressing the validity of a \$5000 per lot in-lieu fee, the court ruled that "it is the actual value of the land which the Town could require reserved as a condition of subdivision approval which sets the upper limit upon the fee in lieu of reservation. So long as the fee does not exceed this level it is not arbitrary or capricious."³⁶³ The court also addressed the equal protection claim that there existed "no rational basis for requiring a few property owners to bear so large a proportion of the recreational expenditures of the Town."³⁶⁴ The court ruled that the "regulation is presumed valid and must be upheld if the challenged classification is rationally related to achievement of a legitimate state purpose."³⁶⁵

In framing a comprehensive impact fee enabling statute to address the relationship between the fee and the development charged, the New York Legislature is likely to incorporate the rational nexus standard. When incorporating this standard, the comprehensive enabling statute should include more than just general language that the ordinance exact fees in a fair or rational manner.³⁶⁶ Rather, the comprehensive statute should further provide direct guidelines for documenting the need for improvements to accommodate new development, and the portion of the cost of these improvements

361. Recall that the court of appeals in *Albany Area Builders Ass'n v. Town of Guilderland*, 74 N.Y.2d 372, 378, 546 N.E.2d 920, 923, 547 N.Y.S.2d 627, 630 (1989), refused to consider the constitutional issues regarding the impact fee ordinance other than the *ultra vires* issue.

362. 144 Misc. 2d 849, 542 N.Y.S.2d 1012 (Sup. Ct. 1989), *aff'd* 160 A.D.2d 668, 559 N.Y.S.2d 807, *appeal dismissed*, 76 N.Y.2d 934, 564 N.E.2d 670, 563 N.Y.S.2d 60 (1990).

363. *Id.* at 858, 542 N.Y.S.2d at 1017.

364. *Id.*

365. *Id.* at 858, 542 N.Y.S.2d at 1018 (citing *Trump v. Chu*, 65 N.Y.2d 20, 478 N.E.2d 971, 489 N.Y.S.2d 455, *appeal dismissed*, 474 U.S. 915 (1985)). *See also* *Bay-swater Realty & Capital Corp. v. Planning Bd.*, 76 N.Y.2d 460, 470-71, 560 N.E.2d 1300, 1305, 560 N.Y.S.2d 623, 628 (1990).

366. *See supra* notes 320 & 324.

attributable to specific development.³⁶⁷ The first consideration should necessarily be addressed in the comprehensive capital improvements plan.³⁶⁸ Provisions should require that this plan be updated regularly to account for changes in area growth patterns.³⁶⁹

Under the second consideration, assessing a proportionate share of the costs requires a comprehensive mathematical formula. For the sake of uniformity and to reduce legal challenge, direction for this formula should be set forth in the enabling statute.³⁷⁰ This mechanism must be able to differentiate the costs attributable to new development from those necessary to maintain or repair existing facilities.³⁷¹ By doing so, the enabling statute prospectively addresses one of the major contentions of the developer community, that impact fees constitute "double taxation," with the buyer paying for the same services in both the fees and property taxes.³⁷²

Another contention of the development community that may be addressed by the enabling statute is the exclusionary effect these fee ordinances have on low to moderate income developments. Since developers generally pass the additional costs created by impact fees on to the customer, the higher the fee, the higher the cost per unit, which thus tends toward exclusion of low to moderate priced development.³⁷³ Compre-

367. See Morgan, Strauss, & Leitner, *supra* note 330, at 7.

368. See *supra* notes 355-356 and accompanying text.

369. TEX. LOCAL GOV'T CODE § 395.052(a) (Vernon Supp. 1991) ("Periodic Update of Land Use Assumptions and Capital Improvements Plan. A political subdivision imposing an impact fee shall update the land use assumptions and capital improvements plan at least every three years.")

370. PA. CONS. STAT. ANN. tit. 53, § 10505-A(2) (Purdon Supp. 1991) ("The specific impact fee for a specific new development or subdivision within the service area for road improvements shall be determined in section 1503-A(a) by the estimated number of trips to be generated by the new development or subdivision using generally accepted traffic engineering standards.")

371. Morgan, Strauss, & Leitner, *supra* note 330, at 7. OR. REV. STAT. § 223.299(1)(b) (1989) ("Capital improvements" [for which fees are collected] does not include costs of the operation or routine maintenance of capital improvements.")

372. Garb, *Developers Complain About 'Hidden Tax'*, N.Y. Times, Dec. 2, 1990, at 5, col. 2.

373. See REGIONWIDE ASSESSMENT, *supra* note 13, at 48-49. "Since most fees are charged on a per-unit basis, builders often compensate for these fees by producing upscale units at lesser densities, despite a regional shortage of moderately priced

hensive enabling statutes have addressed this issue by including an exemption provision allowing local governments to waive fees for such developments.³⁷⁴

The foregoing has been a sample of various provisions that states have incorporated in their comprehensive impact fee enabling statutes in an attempt to create a uniform and equitable mechanism to allow local governments to raise needed revenues to facilitate the development of capital infrastructure necessitated by new growth. It would be prudent for drafters of subsequent statutes, including the New York Legislature, to avail themselves of these various statutory provisions as models for their own impact fee enabling legislation.

As evidenced above, the developing national trend in this area is toward more detailed enabling statutes, with the states directing the form and content of local implementation. Such comprehensive legislative direction necessarily reduces the home rule authority of local governments. This is of little consequence for New York, however, as the court of appeals, through its decision in *Albany Area Builders Association v. Town of Guilderland*,³⁷⁵ has effectively eliminated all home rule authority in this area under the guise of preemption. With this decision, the stage has now been set. All eyes are focused on the state legislature to see if it will (re)act on impact fees.

VIII. Conclusion

Suburban and exurban areas of New York State are facing increased pressure to accommodate new growth and development. When the present recession ends, this pressure will no doubt accelerate. Local government revenue-raising mechanisms, in place to assist the provision of adequate public in-

units." *Id.* at 48.

374. ARIZ. REV. STAT. ANN. § 11-1105(E) (Supp. 1990) ("A county may waive development fees for all development that constitutes affordable housing to moderate, low or very low income households as defined by the United States department of housing and urban development, provided that the waiver does not result in an increase in the development fee for other properties in the benefit area."); see also GA. CODE ANN. § 36-71-4(l) (Supp. 1990).

375. 74 N.Y.2d 372, 546 N.E.2d 920, 547 N.Y.S.2d 627 (1989).

frastructure, are proving inadequate. With continuing cut-backs in federal spending and the present crisis over the state budget, little assistance can be expected from these sources as well. As municipalities struggle to keep their doors open to new development, it is imperative that they be given authority to raise needed revenues outside of increasing property taxes. As demonstrated nationwide, the local impact fee ordinance is a viable option. If structured properly, such ordinances condition new development approvals on the payment by developers of an equitably proportionate share of the cost of off-site infrastructure necessitated by the new development. To assure proper structure of such fee ordinances, detailed guidelines need to be sent down from the state in a comprehensive impact fee enabling statute. Such a statute delegates the necessary authority to impose such fees, as well as directs local governments toward the development of equitable and constitutionally sound impact fee ordinances. As a result of the *Guilderland* decision, it is only through such state delegation of authority that local governments in New York can shift some of their burden for accommodating growth and development with necessary infrastructure to the source of this need, new development.

*"Every restriction on the use of property entails hardships for some individual owners. Those difficulties are invariably the product of police regulation and the pecuniary profits of the individual must in the long run be subordinated to the needs of the community."*³⁷⁶

376. *Golden v. Planning Bd.*, 30 N.Y.2d 359, 381, 285 N.E.2d 291, 304, 334 N.Y.S.2d 138, 154, *appeal dismissed*, 409 U.S. 1003 (1972).